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No.

Supreme Court, U.S.
FILED
JUL 14 1987
JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1987

PATTI AND PAUL ENSIGN,

Petitioners,

v.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS

Of Counsel:

BARBARA J. HEATHFIELD
ANN SLAW
MICHAEL S. HARLEY
CAROL J. BELL
PROTECTION AND ADVOCACY, INC.
175 West Jackson Blvd.,
Ste. A2103
Chicago, Illinois 60604
(312) 341-0022

MICHAEL P. SENG
315 South Plymouth Court
Chicago, Illinois 60604
(312) 987-1446

Counsel of Record

Pandick Technologies, Inc., Chicago • (312) 236-0200

42 pp

QUESTIONS PRESENTED

1. Whether the state violated the due process and equal protection clauses of the Fourteenth Amendment to the Constitution when it terminated the parental rights of two mentally retarded adults without a finding of intent or fault?

2. Whether the state violated the due process and equal protection clauses of the Fourteenth Amendment to the Constitution when it terminated the parental rights of two mentally retarded adults without first considering whether the state's interest could be protected by other, less intrusive alternatives?

3. Whether the state violated the due process and equal protection clauses of the Fourteenth Amendment to the Constitution when it terminated Petitioners' parental rights in the absence of clear and convincing evidence?

LIST OF PARTIES

The parties to the proceedings below were the Petitioners, Paul Ensign and Patti Ensign, and Respondents herein, The People of the State of Illinois.

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No.

In The
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October Term, 1987

PATTI AND PAUL ENSIGN,
Petitioners,

v.

THE PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS

The Petitioners, Patti and Paul Ensign, respectfully pray that a Writ of Certiorari issue to review the judgment of the Appellate Court of Illinois with respect to which a Petition for Leave to Appeal was denied by the Illinois Supreme Court on April 15, 1987.

OPINIONS BELOW

The Order of Adjudication of the Circuit Court of Illinois, Sixth Judicial Circuit, Moultrie County, Juvenile

Division, entered January 14, 1986 is reprinted in the Appendix hereto.

The Dispositional Order of the Circuit Court of Illinois, Sixth Judicial Circuit, Moultrie County, Juvenile Division, entered March 26, 1986 is reprinted in the Appendix hereto.

The Order of the Appellate Court of Illinois, Fourth District, on appeal from the Circuit Court and the opinion in support of that order are reprinted in the Appendix hereto.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C.A. 1257 (3). On April 15, 1987, the Illinois Supreme Court denied the Petition for Leave to Appeal. This Petition is filed within ninety (90) days of that order.

STATEMENT OF THE CASE

The State of Illinois' involvement with these Petitioners began on or about December 12, 1984, when their infant son, Paul, Jr., accidently slipped from a car carrier when his father was attempting to arrange his blanket. This happened on the street in the town where Petitioners live, and was witnessed by a townsperson. Subsequent examination by a physician revealed that the child had not been injured as a result of the fall. However, a series of county and state workers began their involvement with this family at that time, since it was apparent that these Petitioners were mentally retarded and did require some assistance with their child.

On or about July 8, 1985, a Petition for Neglect, Dependency and for the Termination of Parental Rights was filed by the State of Illinois. A hearing was held on that Petition on December 17, 1985, and continued to January 7, 1986. An Order of Adjudication and a Dispositional Order were entered that day and filed on or about January 14, 1986. Several motions for new hearings were filed, on procedural and constitutional grounds, however, these were denied and a new dispositional hearing was held on or about March 26, 1986, and a Dispositional Order terminating Petitioners' parental rights and ordering the adoption of the child was entered on that date.

Petitioners have not seen their son since the day the State of Illinois took him at the beginning of this action in late 1985.

The trial in this case revealed a consensus of opinion with regard to these Petitioners' inability to raise their son *alone*, without the assistance they had been receiving since 1984. There was also consensus of opinion regarding the healthiness and happiness of this baby. All trial testimony addressed the issue of these Petitioners' current and future abilities to raise this child without assistance. There were no allegations, other than the accident with the

carrier addressed above, that these Petitioners had acted in any way neglectful or abusive to the child. Indeed, there was consensus that Petitioners loved their child and were making every attempt to learn to care for him alone. The state conceded at the onset of the action that the facts it would prove were in no way caused through any fault, or intent of the Petitioners, but arose because of Petitioners' mental deficiencies. The state did indeed prove that these Petitioners are probably incapable of ever raising this child without some assistance.

Evidence was introduced as to those state and county services that exist to assist parents with raising their children.

The trial court ordered that Petitioners be examined by psychologists to test their mental abilities, abilities to discharge parental responsibilities, and the likelihood that their mental retardation would be alleviated in the future. The two psychologists confirmed Petitioners retardation, opined their inability to discharge parental responsibilities without assistance, and confirmed that they would continue throughout their lives to be retarded. Neither psychologist met the child, nor observed the child with Petitioners. Neither psychologist recommended termination of these Petitioners' parental rights.

After the trial court entered the Dispositional Order outlined above, a Notice of Appeal was filed approximately one (1) month later, on or about April 15, 1986. On or about October 30, 1986, the Appellate Court of Illinois, Fourth District, entered an order affirming the trial court's Adjudicatory and Dispositional orders. On or about November 20, 1986, Petitioners filed a Petition for Rehearing on constitutional and procedural grounds with the Illinois Appellate Court. An Affidavit of Intent to Seek Review in the Illinois Supreme Court was filed by Petitioners on or about December 8, 1986. On December 9, 1986, a Petition for Certificate of Importance was filed with

the Appellate Court and denied on or about December 17, 1986. On or about January 6, 1987, Petitioners filed a Petition for Leave to Appeal as a matter of Right and Petition for Leave to Appeal with the Supreme Court of Illinois. That Petition was denied on or about April 15, 1987. On May 21, 1987, the Supreme Court of Illinois granted Petitioners Motion for Stay of Mandate pending the timely filing and disposition of this Petition for Writ of Certiorari in the United States Supreme Court.

The issues on appeal involve the state's denial of Petitioners' rights to due process and equal protection under the law.

REASONS FOR GRANTING THE WRIT

I.

The state violated the due process and equal protection clauses of the Fourteenth Amendment when it terminated the parental rights of two mentally retarded adults without a finding of intent or fault.

This case presents the question of whether a state may terminate parental rights when there are no findings of either fault or *intentional* neglect or abuse. Petitioners are the mentally retarded adult parents of a two and a half year old boy. Their parental rights were terminated by the circuit court of Moultrie County, Illinois following a finding of neglect by a preponderance of the evidence, (Slip Opinion at 11.) *Ill. Rev. Stat.* 1985, ch. 37, par. 702-5. The Court then found Petitioners to be unfit parents by "clear and convincing evidence," (Slip Opinion at 14.) *Ill. Rev. Stat.* 1985, ch. 37, par. 705-9(2). The State was made guardian of the minor child with the power to consent to adoption.

Petitioners believe that there was insufficient evidence to support either findings, or the order of adoption. (*See*, Question and Argument 3, infra.)

However, assuming that there existed sufficient evidence to support either finding, the permanent severance of parental rights, without a finding of intent or fault, is an unduly harsh consequence and violates due process, as well as equal protection in this case. As the appellate court noted, the state had conceded from the outset "that the neglect and abuse were not intentional but arose from Respondent's mental deficiencies." (Slip Opinion at 1.) Nonetheless, the court found that "a parent can be unfit (thus his parental rights terminated) without fault." (Parentheses added.) Petitioners disagree. While a court, at an adjudicatory hearing, may make a finding of neglect and abuse without a finding of intent or fault, it does not follow that a

court, in a dispositional hearing, can sever the sacred and fundamental constitutionally-protected parent/child relationship without proving that the parents intentionally, or with fault, abused or neglected their child. In short, Petitioners believe that in order to impose the harshest consequence available in such cases, there must be a finding of fault or intent, as well as concern for the "best interest of the child", which was the sole justification that the state court used to terminate these Petitioners' parental rights. (Slip Opinion at 19.)

This ruling violates the constitutionally-protected rights of all parents, but is unduly harsh in its impact and discriminates against parents who are mentally retarded. All persons with mental deficiencies have reduced ability to cope with and function in the everyday world. *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313, 53 U.S.L.W. 5022 (1985). These deficiencies were unfairly perceived and interpreted to constitute neglect. For instance, the court took special note of the fact that Petitioners were unable to articulate their words as clearly as persons with normal intelligence, as well as Petitioners' alleged inability to remember birth and anniversary dates. The court's reliance on these deficiencies demonstrates inherent prejudice against persons with mental retardation and is not, in any way, rationally related to the legitimate governmental purpose of protecting the children of this state. Bases upon the court's reasoning, it follows that without a finding of intent or fault, parents with mental retardation will automatically be denied the right to raise their children because their mental deficiencies will be prejudicially perceived and interpreted as neglect and abuse by the state, albeit "without fault."

Restrictions based on mental retardation must be rationally related to a legitimate governmental purpose and may not rest upon "irrational prejudice." *Ibid.* The

right of parents to the care and custody of their children is fundamental to our constitutional system. *See, Meyer v. State of Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 29 A.L.R. 1446, 67 L.Ed. 1042 (1923), *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972), and *Santosky v. Kramer*, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982). This case offers this Court an opportunity to affirm that the rights of mentally retarded persons cannot be lost or diminished solely because of their handicap. Cf. *In re Marriage of Carney*, 24 Cal.3d 725, 598 P.2d 36, 157 Cal.Rptr. 383 (1979) (holding that physically handicapped parents have a right to the care and custody of their children.) Although this Court held in *Buck v. Bell*, 274 U.S. 200, 47 S.Ct. 584, 71 L.Ed. 1000 (1927), that a mentally retarded person had no right to procreate, that decision has been undercut by *Skinner v. Oklahoma*, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942), and its continuing validity is doubtful. Due process and equal protection should require that a state prove some fault or intent before parental rights can be severed completely. Compare *Lehr v. Robertson*, 463 U.S. 248, 103 S.Ct. 2985, 77 L.Ed.2d 614 (1983) and *Caban v. Mohammed*, 441 U.S. 380, 99 S.Ct. 1760, 60 L.Ed. 297 (1979) (holding that parental rights could be severed where the parent had failed to establish any custodial, personal or financial relations with the child) with *Stanley v. Illinois*, *supra*, (holding that a state must establish unfitness and proof of neglect at a hearing when it attempts to dismember a family.) And see *Santosky v. Kramer*, *supra*, n.10, (noting that parental rights cannot be terminated solely because it is in the "best interest of the child.")

In this case the state itself has conceded that the parents are without fault; the only problem is that they both happen to be mentally retarded. The ruling of the Illinois courts thus violates equal protection because it directly discriminates against handicapped persons and severs their parental rights protected by due process of law.

II.

The state violated the due process and equal protection clauses of the Fourteenth Amendment when it terminated the parental rights of two mentally retarded adults without first considering whether the state's interest could be protected by other, less intrusive alternatives.

This case presents a question of the degree of scrutiny necessary to justify a decision to terminate the parental rights of mentally retarded adults. This Court has held that mentally retarded persons in and of themselves are not a suspect class for purposes of equal protection analysis. *City of Cleburne v. Cleburne Living Center, supra.* But this case also involves the fundamental constitutional right of parents to raise and care for their children. *Meyer, Stanley, Santosky, supra.* This fundamental right, which is generally grouped under the right of privacy, is given the greatest degree of scrutiny by the courts when it is infringed upon by state actions. *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), *Moore v. City of East Cleveland,* 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977). The traditional test in such cases is whether the restriction is "necessary," or whether a compelling state interest exists to justify such a result. A restriction is not "necessary" if a state can accomplish its goals through less restrictive alternatives. *Shelton v. Tucker,* 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed. 231, (1960); *Bakke v. Regents of the University of California,* 98 S.Ct. 2733, 438 U.S. 265, 57 L.Ed. 750 (1976).

In the present case, the lower courts failed to consider evidence that the state's objective of protecting the health or safety of the child could have been accomplished by less intrusive means. A number of obvious, easy alternatives come to mind: requiring the presence of a competent adult on the household at least at certain times of the day, providing training for these retarded parents, or providing

temporary foster care. These or other alternatives would have had the virtue of maintaining the family unit to a greater extent that the order entered below which permanently and irrevocably severed all family ties.

Even if the Court were not to use the strictest form of scrutiny, this Court has held under the reasonableness standard that "the existence of obvious easy alternatives" may be evidence that the state's response is not reasonable, but is an "exaggerated response." *Turner v. Safley*, 107 S.Ct. 2254, 55 U.S.L.W. 4719 (1987). The presence of obvious and easy alternatives belies the reasonableness of severing the parental ties in this case and clearly establish that the action taken by the state courts was based upon "irrational prejudice" against handicapped persons. *City of Cleburne v. Cleburne Living Center, supra.*

As discussed in our final argument, the child in this case was alert, healthy, gaining weight, happy, well-cared-for, and not developmentally delayed. There was no allegation of abuse or failure to gain weight and thrive. These parents had recognized the limitations inherent in their disability and had sought, and received, the assistance of state agencies in caring for him. Just as some families require financial assistance from the state, these parents required other forms of assistance. The evidence shows that Petitioners were benefiting from the services; not only was the baby healthy and happy, but the Petitioners' knowledge and parenting skills improved through those services. Despite this evidence, the trial Court made the decision to look only at the parents' limitations, rather than the current condition of the child, in making the decision to terminate the Petitioners' parental rights. This standard was found to be proper by the Illinois Court of Appeals. Consequently, a new standard now exists for termination of parental rights in the State of Illinois. Parents only have the constitutional right to raise their children if they can do so alone–without the assistance of the com-

munity services that exist for the very purpose of assisting parents such as these Petitioners.* We fail to see the state's necessity in this position, especially in light of the less intrusive alternatives.

The court's two psychologists who testified at the trial level rejected termination and suggested less intrusive and restrictive alternatives. Where a state interest conflicts with fundamental personal liberties the means by which that interest is promoted must be carefully selected so as to result in the minimum infringement of the protected rights. *Griswold v. Connecticut* 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); *NAACP v. Alabama*, 377 U.S. 288, 84 S.Ct. 1302, 12 L.Ed. 325 (1964). Governmental purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The state court's failure to consider obvious and easy alternatives, or evidence as to less intrusive means to achieve the state's end, prior to irrevocably and permanently severing all ties between these Petitioners and their child is a violation of Petitioners' constitutional rights to equal protection and due process.

III.

The state violated the due process and equal protection clauses of the Fourteenth Amendment when it terminated Petitioners' parental rights in the absence of "clear and convincing evidence".

This Court has specifically required a state to produce "clear and convincing evidence" of unfitness prior to severing completely and irrevocably parental rights. *Santosky v. Kramer*, 455 U.S. 745 (1982). The trial court stated that it found that the minor was neglected by the preponderance of the evidence standard. (Slip Opinion at 11.) *Ill.Rev.Stat.* 1985, ch. 37, par. 702-5. The court then stated that it found the Petitioners to be unfit parents by the "clear and convincing evidence" standard. (Slip Opinion

* Although *Ill.Rev.Stat.* (1985), ch. 37, par. 705-7 requires a finding that "appropriate services aimed at family preservation and family reunification have been unsuccessful in rectifying the conditions" contributing to the neglect, the lower courts did not make such a finding.

at 14.) *Ill.Rev.Stat.* 1985, ch. 37, par. 705-9(2).

The courts below parroted the "clear and convincing" standard, but the record is devoid of evidence to support their findings. Although this Court normally will not review findings of fact made by the lower courts, it will do so when no evidence supports the court's conclusion, *Thompson v. Louisville*, 362 U.S. 199, 80 S.Ct. 624, 80 A.L.R.2d 1355, 4 L.Ed.2d 654 (1960), or when findings of fact and law are inextricably intermingled, *Fiske v. Kansas*, 274 U.S. 380, 47 S.Ct. 655, 71 L.Ed. 1108 (1927), or when the state courts attempt to frustrate federal law by distorted fact finding. *Cox v. Louisiana*, 85 S.Ct. 453, 378 U.S. 536 (1965). These circumstances are present in this case. The Illinois courts found Petitioners to be unfit parents even though there was no evidence:

of failure to thrive;
of improper nutrition or clothing;
of any lack of necessary medical care;
of any injuries;
of abandonment;
of any lassitude;
of any delayed development;
that the child was dirty or uncared for;
of undernourishment; and
of any neglect or abuse.

To the contrary, there *was* evidence:

that the child was receiving proper nutrition (R. 35, 40, 112, 131, 105, 159);

that the child received appropriate medical care (R. 159, 213);

that the parents provided emotional and physical stimulation for the child (R. 189, 159, 167, 184, 201, 217, 219, 201, 198-200);

that Petitioners could continue to improve their parenting skills, despite their disability (R. 220, 223-4,

227, 246, 198-200, 106-7, 114, 127-134, 35);

that the Petitioners cooperated fully with all services offered to them (R. 20, 41, 210, 216); and

that Petitioners love their child and care for him (R. 159, 167, 184, 201).

The record thus reflects that the Petitioners love their child, (R. 159) accepted assistance when they needed it, (R. 41) and constantly tried and learned to perfect their parenting skills, (R. 127-134.) The baby was loved, happy, healthy, thriving and developing normally. (R. 159,105,213.) The only evidence in the record adverse to Petitioners is that they were mentally retarded. Mental retardation alone is constitutionally insufficient to sever the parental relationship.

The state violated these Petitioners' due process and equal protection rights through its finding of unfitness and termination of these Petitioners' parental rights without the necessary clear and convincing evidence to support those decisions.

CONCLUSION

For the reason stated above, this Court should grant the Petition for Writ of Certiorari in order to review the final judgment of the Illinois Appellate Court in this case.

Respectfully submitted:

MICHAEL P. SENG
315 South Plymouth Court
Chicago, Illinois 60604
(312) 427-2737

Counsel of Record

Of Counsel:

BARBARA J. HEATHFIELD
ANN SLAW
MICHAEL S. HARLEY
CAROL J. BELL
PROTECTION AND
ADVOCACY, INC.
175 West Jackson Blvd.,
Ste. A2103
Chicago, Illinois 60604
(312) 341-0022

APPENDIX

APPENDIX A

IN THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT, ILLINOIS
Moultrie County, Juvenile Division

IN THE INTEREST OF

PAUL ENSIGN, JR.
a minor

No. 85-L-124

ORDER OF ADJUDICATION

On petition for adjudication of wardship, the court, after considering the evidence, finds:

1. The court has jurisdiction of the case and of all parties.

2. The minor is

☐ delinquent.

☐ otherwise in need of supervision.

☒ neglected.

☒ dependent.

3. It is in the best interests of the minor and of the public that the minor be made a ward of the court.

It is ordered:

a. The minor is adjudged a ward of this court;

b. Dispositional hearing is set for N/A, 19____, at N/A ___ m.;

c. Pending dispositional hearing the minor is placed in temporary custody of _____ _____to be kept in a suitable place.

Jan. 14th 1986

W.B. KRANZ
Judge

FILED
JAN 14 1986

CIRCUIT COURT
MOULTRIE COUNTY

APPENDIX B

FILED
MAR 26 1986

STATE OF ILLINOIS
IN THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT
MOULTRIE COUNTY

IN THE INTEREST OF
PAUL ENSIGN, JR.
A Minor.

No. 85-L-124

DISPOSITIONAL ORDER

This cause having come for Adjudicatory Hearing on December 17, 1985 and January 7, 1986 and for Dispositional Hearing on March 26, 1986 and Respondent mother, Patty Ensign being present with her attorney, Sharon Buckler, and Respondent father, Paul Ensign, being present with his attorney, Oliver D. Elder, and Paul L. Stone, Moultrie County State's Attorney being present, and Dan Flannell, Guardian Ad Litem for the minor being present, the Court having heard evidence and arguments of counsel and being fully advised finds:

1. That it has jurisdiction of the parties hereto and the subject matter hereof, all parties having been served with Summons.

2. That Paragraph 6(a), 6(b), 6(c), 6(d) and 6(f) of the Petition for Neglect, Dependency and for the Termination of Parental Rights filed July 8, 1985 having been proven by a clear and convincing evidence as follows:

(a) That the Respondent mother and father are unfit parents in that they failed to maintain a reasonable degree of interest, concern, or responsibility as to the child's welfare;

(b) That the Respondent mother and father are unfit parents in that they substantially neglected the child repeatedly;

(c) That the Respondent mother and father are

unfit parents in that they failed to protect the child from conditions within his environment injurious to the child's welfare;

(d) That the Respondent mother and father are unfit parents in that they failed to demonstrate a reasonable degree of interest, concern, or responsibility as to the welfare of a newborn child during the first thirty days after its birth;

(e) That the Respondent mother and father are unfit parents in that they have been determined unable to discharge parental responsibilities by competent evidence from a Clinical Psychologist of Mental Impairment, and/or Mental Retardation as defined in Section 1-116 of the Mental Health and Developmental Disabilities Code, and there is sufficient justification to believe that such inability to discharge parental responsibilities shall extend beyond a reasonable time period.

3. That it is in the best interests of the minor and the public that the minor be made a ward of the Court.

4. That it is in the best interests of the minor to terminate the parental rights of the Respondent parents and that a Guardian with the power to consent to the adoption of said minor be appointed.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the minor is declared a neglected and dependent minor and made a ward of this Court and that the parental rights of Respondent parents, Paul Ensign and Patty Ensign are hereby irrevocably terminated, that Gary T. Morgan, Guardianship Administrator for the Department of Children and Family Services or his successor in office be and is hereby made legal guardian and legal custodian of said minor, Paul Ensign, Jr., with the power to consent to the adoption of said minor and that the consent to the adoption of the said minor by said legal guardian shall be binding upon Respondent parents Paul Ensign and

Patty Ensign without any further notice to them or consent by them.

ENTER: March 26, 1986

W.B. KRANZ

CIRCUIT JUDGE

APPENDIX C

No. 4-86-0265

IN THE APPELLATE COURT OF ILLINOIS FOURTH DISTRICT

In The Interest of Paul Ensign, Jr., a Minor THE PEOPLE OF THE STATE OF ILLINOIS,
Petitioner-Appellee,

v.

PATTY ENSIGN and PAUL ENSIGN, SR.,
Respondents-Appellants.

Appeal from the Circuit Court County of Moultrie

No. 85L124

Honorable Worthy B. Kranz, Judge Presiding.

FOR APPELLANT

KATHRYN E. EISENHART, *ATTORNEY*
CAROL BELL, MANAGING *ATTORNEY*
PROTECTION & ADVOCACY, INC.
504 E. Monroe Street
Suite 1020
P.O. Box 2206
Springfield, IL 62705

GUARDIAN AD LITEM

DAN FLANNELL
Attorney at Law
200 W. Harrison
Sullivan, IL 61951

FOR APPELLEE

PAUL LEE STONE
STATE'S ATTORNEY
MOULTRIE COUNTY COURTHOUSE
Sullivan, IL 61951

KENNETH R. BOYLE, DIRECTOR
State's Attorneys Appellate Prosecutor
151 Bruns Lane, Suite 103
Springfield, IL 62702
ROBERT J. BIDERMAN
Deputy Director
REBECCA L. WHITE
Staff Attorney

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OCT 30 1986
Clerk of the
Appellate Court
4th Dist.

No. 4-86-0265

IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

In The Interest of Paul Ensign, Jr., a Minor
THE PEOPLE OF THE STATE OF ILLINOIS,
Petitioner-Appellee,

v.

PATTY ENSIGN and PAUL ENSIGN, SR.,
Respondents-Appellants.

Appeal from Circuit Court County of Moultrie

No. 85L124

Honorable
Worthy B. Kranz,
Judge Presiding.

JUSTICE SPITZ delivered the order of the court:

Paul Ensign, Jr., was born on November 28, 1984, to Patti and Paul Ensign, Sr., a mentally retarded couple. Paul, Jr., suffers from microcephaly. A petition for neglect, dependency, and for the termination of parental rights was filed July 8, 1985. A hearing was held on that petition on December 17, 1985, and continued to January 7, 1986. The State noted at the outset that the neglect and abuse were not intentional but arose from respondents' mental deficiencies.

The State's first witness was Nancy Robbins. Robbins testified that she had known respondent, Paul Ensign, Sr., for over 20 years and had become acquainted with respondent, Patty Ensign, since she had married Paul. In December 1984, she had been near the Spot restaurant in Sullivan when respondents' child, Paul Ensign, Jr., was 11 to 12 days' old. Respondent father was holding the child on a plastic infant seat in front of him. He brought his knee up to balance the seat and the baby and blanket covering him slid out, falling about three feet to the sidewalk. Respondent mother become hysterical, and respon-

dent father replaced the child and they moved on down the street. After 30 to 40 seconds, the baby started to cry.

The State's next witness was Joy Colclasure. Colclasure testified that she also knew respondents and had learned of the previously mentioned incident from Nancy Robbins. Concerned that the baby had not been taken to a doctor, the two women searched for respondents. The child had not been checked by a physician so Joanna Cole, the county nurse, was contacted. Following this incident, Colclasure began to take formula, food, and towels over to respondents' residence, a second-floor apartment which she described as in not too bad of shape. Respondents, however, were dirty and needed to bathe. There was little food around. Colclasure showed respondent mother how to mix the formula she brought and attempted to get her to keep the empty bottles in the refrigerator so that she could determine the amount of milk the child was ingesting. This met with little success. Colclasure continued to go to respondents' home regularly, attempting to get them to practice better hygiene and bringing them the necessary items to do so. She also tried to get respondent mother to rotate the baby's head and put him in different positions. Respondent mother agreed to this, but to Colclasure's knowledge, it was never done. The heat in respondents' apartment was always kept much too high, although the apartment was never very poorly kept.

Joanna Cole, the Moultrie County health nurse, testified that Linnea Lamendole, owner of the Spot restaurant, alerted her to the fact that Paul Ensign, Jr., had been dropped. She checked the baby and found no contusions or bruises, but had a policeman take the child to the doctor anyway. Later respondents brought the boy in for immunization and to pick up their certificates to obtain food for him. The medical staff was concerned that the baby was not wrapped properly and was not being strapped in his carrier. Although instructed in the proper proce-

dure, respondents did not immediately correct the situation. When Paul, Jr., got bigger, they put him in a stroller. Cole had also been to respondents' apartment and described it as poor, but not unsanitary. Most of the time the baby appeared well. On cross-examination, Cole noted that she also recalled respondents' apartment being extremely hot. Respondent mother did not know how to change the baby at that time. Although respondents made some progress in caring for their child, Cole still feared for the baby's safety. During redirect, Cole revealed that respondents' progress was inadequate to enable them to independently discharge their parental responsibilities toward the child or to properly raise him and provide for his safety.

Dr. Jean Roland Gillespie, a registered psychologist, stated that she had received background information on respondents and interviewed them herself. She also went to lunch with them in order to observe them in a social setting and to note their ability to pay bills. Respondent father was noted to be functioning at a higher intellectual level than his wife and could write his name and count, but was unable to write or recite the alphabet. Both respondents could identify colors. Respondent father was oriented to place, but not time, and was confused about his birthdate, his child's birthdate, and his anniversary. Respondents were able to decide what they wanted for lunch, but did not know if the cashier gave them the proper amount of change. Respondent mother was apparently prone to falling asleep frequently and was very difficult to arouse. She also was unable to read the oven dial so was forced to boil or fry all foods. Respondents prepared the baby's milk by leaving his bottle out to warm to room temperature since he did not like his milk cold. Respondents both had articulation and language development problems. Respondent father was functioning at a 7-year-old level and he has an IQ of 43, which is in the mentally defective range. Respondent mother has an IQ of 36, which is also in the mentally defective range. She also had

difficulty with her short-term memory. Both respondents had difficulty understanding and recalling directions of simple self care, and, even when they learned simple tasks, had a tendency to forget them. In an emergency situation, neither respondent would know what to do if they were unable to reach a helpful third party. Gillespie was concerned if they could even recognize a problem. In Gillespie's opinion, neither respondent was capable of discharging their parental responsibilities, and respondents would not be able to learn the skills necessary to enable them to keep their child regardless of their motivational level. Gillespie's recommendation had not been termination of respondents' parental rights, but had been for foster care with vistation.

The State's next witness was Susanne Wainscott, a registered nurse who made home visits to respondents beginning in December of 1984. Originally, she came to deal with respondents as developmentally disabled adults, attempting to assess their baby's environment and offer services to respondents. At the first meeting, Wainscott gave respondents general instructions on handling the baby, instructing them to pick him up by the body as opposed to respondents' habit of lifting him by the arms, and telling them how to properly support his head. By the time of the hearing, respondents still required the same instructions. Wainscott also noticed rough handling of the baby, including bouncing at a very early age and letting the child roll off a pillow onto the floor. At two months, respondent father was bouncing the child from his abdomen onto the infant's head. Respondent father was still handling the child roughly at the time of the hearing. Wainscott had observed that the child's bottle was at times too hot and at times too cold. When she asked how many bottles the baby had taken, Wainscott was invariably told two. On her last visit, she observed a large box, full of garbage and roaches. Respondent father took it out. Medicine had been left on the floor in an area where the

baby was often allowed to lie. Other items also littered the floor. Although constantly instructed to turn the thermostat down, respondents failed to ever comply. They were also instructed to fix a large hole in their screen door but failed to do so after two months. Wainscott was still forced to repeat the same instructions to respondents as she had when she first became involved with them. Their cleanliness was of major concern. Wainscott expected no improvement regarding respondents' parenting skills.

Ron Matthews testified that he was the executive director of the Moultrie County Counseling Center. He had known respondent father for 10 years and respondent mother for two. His first involvement with the two came when they were living with respondent's mother in an unfit mobile home, heating it by burning wood and rags in a five-gallon bucket in the middle of their living room. Following the mother's death, the situtation deteriorated even further and became unlivable. A mental test of respondent father showed that he was mentally retarded. The doctor believed that respondent's judgment potential was impaired and that he would be unable to adequately discharge his parental responsibilities in raising a child. Matthew believed that this condition would remain unchanged. It was also Matthew's belief that respondent mother would be unable to make appropriate judgments as to the child or to determine what was required in any but the most basic medical situation. In his opinion, she was unable to discharge her parental responsibilities. Matthew believed that respondents could benefit from a shelter-care situation but such would be unavailable to them with a child. Matthew questioned respondents' ability to provide a well-balanced diet for their child, but felt that they loved him.

The State called Jackie Guin who had known respondents for about a year. On July 4, 1985, she observed respondents at an Independence Day festival. Respondent

father had the baby on a picnic table and dragged him by the legs down the top of the splintery surface about four feet. He also held the baby up to within one foot of the speaker from which extremely loud music was coming.

David Cole testified that he was the supervisor for Illinois Department of Children and Family Services (DCFS) and confirmed that shelter-care facilities in the area did not accept children. He also advised the court that retarded children were fairly easy to place once they were available for adoption, and that foster-care placements were not good alternatives due to the lack of permanency that they entailed. The State rested.

Respondents' counsel moved for a directed finding in their favor but the motion was denied. Virginia Duaz, a pediatrician, testified that she knew respondents and that their son had been brought to her for a general checkup in February of 1985, when he was 2 1/2 months old. She had noticed that his head was very small and flat. She saw him again when he was five months old. At that time, the child was gaining weight but his head was still extremely small. A month later, conditions were unchanged. It was discovered that both respondents also had very small heads. At nine months, the boy was standing up with support. At 11 months, it was advised that the child be placed in a program which provided developmental support. No signs of abuse were ever observed on the child. Duaz opined that his motor development was within normal limits.

Daile Rozene testified on behalf of respondents. He was a farmer who had employed respondent father for about 15 years. Respondent father drove the tractor, plowed, and disced for Rozene, in addition to taking grain to the elevator. Rozene characterized him as a good worker who could recognize potential mechanical problems and had never been injured. Respondent father was always ready when Rozene arrived for him. Respondent father loved his child. the child always appeared to be prop-

erly cared for. There were no signs of neglect. Rozene felt that respondent father was able to properly discharge his parental responsibilities. On cross-examination Rozene acknowledged that he made the decisions on the farm and dictated in what order they were to be discharged. Rozene estimated that respondent father worked part-time on his farm six months out of the year.

Daniel Pochetti testified that he was a physician specializing in pediatrics and pediatric neurology and had seen the minor child in this case when he was 9 or 10 months old. He examined the child's head and found that he had a genetically related microensophallic condition. Nothing could be done to make his brain grow to normal size. He was high rise for developmental delay and retardation. Professional stimulation was advised. Dr. Pochetti testified that respondents both appeared to love the child and no physical abuse was suspected. It would be difficult for him to adjust to separation from his parents, although not impossible. On cross-examination, Pochetti considered it very likely that the child would be slower in learning to appreciate dangers due to his developmental problems. His emotional and mental development would likely be set back by removal from his parents; however, if he stayed with them, outside assistance would definitely be required due to respondents' mental handicaps. Dr. Pochetti acknowledged that he was neither a psychiatrist nor a psychologist and had never observed or examined either respondent other than during the child's office visits.

Vicki Baxter, a social worker who had been involved with the minor child since December of 1984 as a caseworker, testified that respondents were cooperative during her visits to assist in child rearing techniques and transportation, which occurred once or twice a month. Their home was adequate, and respondents had a caring attitude toward the child but did not provide enough attention to his emotional development. A homemaker would be required

on a permanent basis so long as the child remained in respondents' home. Respondents did not provide or possess the ability to independently care for the physical needs of the child or to give him proper stimulation.

The DCFS homemaker, Rene Willoughby, testified that she had been in contact with respondents and their child since December 18, 1984. At the time, the child needed to be bathed and fed. Willoughby helped respondent mother mop floors and keep things clean. Respondent mother was cooperative, and the baby's health was always good. Willoughby took the child for a doctor appointment and had to bribe respondent mother with the promise of a milk shake if she was "good." Respondent mother could not handle the baby alone. Respondents could not comprehend that a child often does not know when he should not handle something or put it in his mouth and tended to leave things on the floor.

Bob Wheaton testified that he was respondent father's brother-in-law and spent a lot of time with respondents. Occasionally their child might roll off the bed and bump his head but he was not abused. He was appropriately dressed and fed. Wheaton stated that he would take the child to a doctor if the situation required it.

Respondent father took the stand in his own behalf. He confirmed his employment with Daile Rozene. Respondent father appeared to understand the meaning of the proceedings fairly well. He said he would be willing to cooperate with those attempting to help him. Respondent father said that he could feed and change his son. He remembered when the child had slipped from his grasp at an early age as had been previously testified to. He felt that he could raise the child but seemed to understand that he needed help. Respondent father said that he had a sixth-grade education. Respondents rested.

An order of adjudication and a dispositional order were entered on January 7, 1986, and filed on January 14, 1986.

The order of adjudication contained a finding pursuant to section 2-4 of the Juvenile Court Act (Ill. Rev. Stat. 1985, ch. 37, par. 702-4) that the minor was neglected and abused, and a finding pursuant to section 2-5 of the Juvenile Court Act (Ill. Rev. Stat. 1985, ch. 37, par. 702-5) that the minor was dependent and the minor was made a ward of the court pursuant to section 1-4(b) of the Juvenile Court Act. (Ill. Rev. Stat. 1985, ch. 37, par. 701-4(b).) The dispositional order contained a finding pursuant to section 5-9(2) of the Juvenile Court Act (Ill. Rev. Stat. 1985, ch. 37, par. 705-9 (2)) and section 1 of the Illinois Adoption Act (Ill. Rev. Stat. 1985, ch. 40, par. 1501) that respondents were unfit parents. Respondents' parental rights were terminated, the minor was removed from respondents' custody, and the minor was placed in the custody and guardianship of the Department of Children and Family Services with said guardian being granted the power to consent to the adoption of the minor. Several motions for new hearing were filed and another dispositional hearing was held March 26, 1986. A new dispositional order was entered that day. Notice of appeal was filed on April 15, 1986.

The first argument raised by respondents on appeal is that the State failed to prove that Paul Ensign, Jr., was neglected or abused or was a dependent minor. At an adjudicatory hearing, the applicable burden of proof for a finding of neglect or abuse pursuant to section 2-4 of the Juvenile Court Act (Ill. Rev. Stat. 1985, ch. 37, par. 702-4) and for a finding that an individual is a dependent minor pursuant to section 2-5 of the Juvenile Court Act (Ill. Rev. Stat. 1985, ch. 37, par. 702-5) is the preponderance of the evidence standard (Ill. Rev. Stat. 1985, ch. 37, par. 701-4 (a); *In re Hill* (1981), 102 Ill. App. 3d 387, 430 N.E.2d 75), and the court's determination will not be overturned on review unless it is against the manifest weight of the evidence. *Hill.*

Section 2-4 of the Juvenile Court Act (Ill. Rev. Stat.

1985, ch. 37, par. 702-4) provides, in pertinent part:

> "(1) Those who are neglected include any minor under 18 years of age:
>
> whose parent or other person responsible for the minor's welfare does not provide the proper or necessary support, education as required by law, or medical or other remedial care recognized under State law as necessary for a minor's well-being, or other care necessary for his or her well-being, including adequate food, clothing and shelter, or who is abandoned by his or her parents or other person responsible for the minor's welfare.
>
> (2) Those who are abused include any minor under 18 years of age:
>
> * * *
>
> (b) whose environment is injurious to his or her welfare."

Section 2-5 of the Juvenile Court Act (Ill. Rev. Stat. 1985, ch. 37, par. 702-5) provides, in pertinent part:

> "(1) Those who are dependent include any minor under 18 years of age ***;
>
> (b) who is without proper care because of the physical or mental disability of his parent, guardian or custodian; ***."

The findings of neglect and dependency are both founded upon the conclusion that respondents have failed to provide proper care for the minor. The evidence that was presented in this case revealed that respondents were unable to (1) properly feed the child; (2) properly regulate the temperature in their apartment; (3) recognize and appropriately respond to medical emergencies; and (4) provide adequate emotional and physical stimulation. The fact that the minor in this case suffers from microcephaly and is a high risk for developmental delay and retardation placed an even more severe responsibility on respondents which they are unable to discharge. The best interest and welfare of the child is the essential policy considera-

tion in child neglect cases (*In re Stilley* (1977), 66 Ill. 2d 515, 363 N.E.2d 820) and the minor's physical problems are definitely a factor that should be considered in the instant case. In making a finding of neglect, a court is to determine whether a child is receiving the care necessary for his well-being, and not necessarily whether the parents have been "neglectful." *In re Gates* (1978), 57 Ill. App. 3d 844, 373 N.E.2d 568.

The finding of abuse in the instant case is based on the conclusion that the minor's environment is injurious to his welfare. The evidence that was presented in this case revealed that (1) the minor was accidentally dropped on a hard surface at a very young age; (2) respondents fail to comprehend potentially dangerous conditions in and around their home, and tend to leave dangerous items, such as medicine, within the minor's reach; and (3) respondents have a severely limited ability to recognize and respond to medical emergencies that might arise. This evidence clearly supports the trial court's finding of abuse.

We believe that the court's finding of abuse, neglect, and dependency are all amply supported by the record in this case, particularly in light of the applicable preponderance of the evidence standard.

Respondents' final argument is that the State failed to prove that they were unfit parents by clear and convincing evidence. Pursuant to section 5-9(2) of the Juvenile Court Act (Ill. Rev. Stat. 1985, ch. 37, par. 705-9(2)), the court may terminate parental rights upon finding that the parents are unfit as defined in section 1D of the Illinois Adoption Act (Ill. Rev. Stat. 1985, ch. 40, par. 1501D), which provides, in pertinent part, as follows:

> "D. 'Unfit person' means any person whom the court shall find to be unfit to have a child, without regard to the likelihood that the child will be placed for adoption, the grounds of such unfitness being any one or more of the following:

* * *

(b) failure to maintain a reasonable degree of interest, concern or responsibilty as to the child's welfare;

* * *

(d) substantial neglect of the child if continuous or repeated;

* * *

(g) failure to protect the child from conditions within his environment injurious to the child's welfare;

* * *

(1) failure to demonstrate a reasonable degree of interest, concern or responsibility as to the welfare of a new born child during the first 30 days after its birth;

* * *

(o) repeated or continuous failure by the parents, although physically and financially able, to provide the child with adequate food, clothing, or shelter.

(p) inability to discharge parental responsibilities supported by competent evidence from a psychiatrist or clinical psychologist of mental impairment, mental illness or mental retardation as defined in Section 1-116 of the Mental Health and Developmental Disabilities Code, or developmental disability as defined in Section 1-106 of that Code, and there is sufficient justification to believe that such inability to discharge parental responsibilities shall extend beyond a reasonable time period."

The trial court entered finding of parental unfitness pursuant to subsections (b), (d), (g) (*1*), (o), and (p) of section 1D of the Adoption Act (Ill. Rev. Stat. 1985, ch. 40, par. 1501D(b), (d), (g), (*1*), (o), (p)). Respondents contend that the State failed to prove unfitness based on any of these subsections by clear and convincing evidence.

As the court stated in *In re Adoption of Burton* (1976),

43 Ill. App. 3d 294, 301, 356 N.E.2d 1279, 1285:

> "[T]he steps taken in an adoption proceeding are subject to the most careful judicial scrutiny, and that to justify termination of a natural parent's rights, unfitness must be established by clear and convincing evidence."

However, as the court stated in *In re Jones* (1975), 34 Ill. App. 3d 603, 607-08, 340 N.E.2d 269, 273:

> "[I]n determining whether in this case parental unfitness was proved by clear and convincing evidence, we bear in mind that the trial court's finding should not be disturbed unless it is contrary to manifest weight of the evidence [citation]; [and] that the credibility of witnesses is a matter we must leave to the trier of the facts [citation]; ***."

See also *In re R.M.B.* (1986), 146 Ill. App. 3d 523, 527-28, N.E.2d

We believe that the findings of unfitness pursuant to all six of the subsections quoted above are amply supported by the record in this case. Any one of these findings, if supported by clear and convincing evidence, is sufficient to support the trial court's decision to terminate parental rights in this case.

Although substantial evidence was presented to support each of the findings, we conclude that the finding pursuant to subsection (p) (Ill. Rev. Stat. 1985, ch. 40, par. 1501D(p)) is the most conclusive and indisputable. Two registered psychologists, as well as several other trained professionals, testified that respondents both suffered from severe mental impairment, and this fact is not in dispute. The evidence in this case has conclusively demonstrated that due to severe mental impairment, respondents are unable to discharge their parental responsibilities. As previously stated, respondents are unable to provide proper nutrition, medical care, and emotional and physical stimulation for the minor. Furthermore, in the instant case there is more than sufficient justification to believe that

respondents' inability to discharge parental responsibilities will extend beyond a reasonable time. The undisputed evidence, as presented by the psychologists and the other trained professionals who were involved in this case, is that respondents' conditions of severe mental impairment will not be alleviated in the foreseeable future. The minor is at high risk for developmental delay and retardation, and these conditions are likely to manifest themselves in the future, thereby increasing the amount of care the minor will need. As the respondents' parenting skills remain static and the minor's need for care and stimulation increases, respondents' abilities to discharge their parental responsibilities would consequently be diminished even further. The trial court's finding of parental unfitness pursuant to section ID(p) of the Adoption Act (Ill. Rev. Stat. 1985, ch. 40, par. 1D(p)) is definitely supported by clear and convincing evidence.

The trial court's findings of unfitness pursuant to section 1D(b), (d), (g), (*1*), and (o) (Ill. Rev. Stat. 1985, ch. 40, par. 1501D(b), (d), (g), (*1*),(o)) are all interrelated and based upon the same facts in evidence . Respondent father dropped the minor at a very young age, and respondents took no action on their own to attend to his physical condition. Although repeatedly instructed regarding the proper feeding and hygiene of the minor, respondents were unable to master these basic tasks. Respondents left dangerous objects such as medication within the reach of the child, and respondents apparently could not comprehend that this could be dangerous to the minor. In the opinion of the psychologists, respondents were unable to recognize and appropriately respond to medical emergencies which may arise. Furthermore, respondents were unable to provide appropriate emotional and physical stimulation for the minor. Consequently, we conclude that the trial court's findings of parental unfitness pursuant to section 1D(b), (d), (g), (*1*), and (o) (Ill. Rev. Stat. 198, ch. 40, par. 1501D(b), (d), (g), (*1*), (o)) are supported by clear and convincing evi-

dence.

The evidence in this case is undisputed that respondents have a great amount of love and affection for their child. We are mindful of the fact that all persons, including the retarded, have the right to marry, establish a home, and raise a family (*Meyer v. Nebraska* (1923), 262 U.S. 390, 67 L. Ed. 1043, 43 S. Ct. 625; *Helvey v. Rednour* (1980), 86 Ill. App. 3d 154, 408 N.E.2d 17) and that these rights are of deep human importance and should not be terminated lightly. (*In re Paul* (1984), 101 Ill. 2d 345, 461 N.E.2d 983.) However, as the court stated in *In re Hrusosky* (1976), 39 Ill. App. 3d 954, 957, 351 N.E.2d 386, 388:

> "[I]t is established by the statutes of this State that the public policy, when a natural parent becomes unfit, is to terminate the parental rights and place the child for adoption [citation]."

Furthermore, as the Court stated in *In re Devine* (1980), 81 Ill. App. 3d 314, 320, 401 N.E.2d 616, 621:

> "[A] parent can be unfit without fault. Such a conclusion is necessary if its is to accord with the legislative intent of an act manifestly concerned with the best interests of the child. Section 20a of the Adoption Act (Ill. Rev. Stat. 1977, ch. 40, par. 1525) expressly instructs that 'the best interests and the welfare of the person to be adopted shall be of paramount consideration in the construction and interpretation of this Act.' We abide by that instruction. A child is no less exposed to danger, no less dirty or hungry because his parent is unable rather than unwilling to give him care."

See also *In re R.M.B.* (1986), 146 Ill. App. 3d 523, 528-29, N.E. 2d , .

For the reasons stated herein, the order of adjudication and the dispositional order entered by the circuit court are hereby affirmed.

Affirmed.

GREEN and MORTHLAND, J.J., concur.

Supreme Court, U.S.
FILED
NOV 6 1987
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CLERK

(2)

No. 87-135

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

PATTI AND PAUL ENSIGN,

Petitioners,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, Fourth District

RESPONDENT'S BRIEF IN OPPOSITION

NEIL F. HARTIGAN
Attorney General, State of Illinois
SHAWN W. DENNEY
Solicitor General, State of Illinois
TERENCE M. MADSEN *
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 917-2235
Attorneys for Respondent

KENNETH A. FEDINETS
Assistant Attorney General
Of Counsel

* Counsel of Record

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QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court should decline to grant review in this case where petitioners did not advance the constitutional issues in the court below.
2. Whether petitioners' rights to due process and equal protection were violated when their parental rights were terminated upon a finding that their mental illness prevented them from discharging their parental responsibilities.
3. Whether petitioners' rights to due process and equal protection were violated where their parental rights were terminated upon a finding of unfitness based on clear and convincing evidence.
4. Whether petitioners' rights to due process and equal protection were violated where the court below found that there was clear and convincing evidence to support the finding of unfitness.

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No. 87-135

IN THE

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OCTOBER TERM, 1987

PATTI AND PAUL ENSIGN,

Petitioners,

VS.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, Fourth District

RESPONDENT'S BRIEF IN OPPOSITION

OPINION BELOW

The order of the Illinois Appellate Court, Fourth District, is unpublished. *People v. Ensign*, ____ Ill. App. 3d ____, ____ N.E.2d ____ (4th Dist. 1986). The order has been submitted to this Court as Appendix C to the Petition for Writ of Certiorari and, therefore, is not contained in this Brief in Opposition.

JURISDICTION

The jurisdiction of this Court is not properly invoked under 28 U.S.C. § 1257(3).

STATEMENT OF THE CASE

Paul Ensign, Jr. was born on November 28, 1984, to petitioners, Patti and Paul Ensign, a mentally retarded couple. A petition for neglect, dependency, and for the termination of parental rights was filed in the Circuit Court for the Sixth Judicial Circuit, Moultrie County, Illinois, on July 8, 1985. A hearing was held on that petition in the circuit court. Subsequent to the hearing the court found, in an order of adjudication pursuant to section 2-4 of the Juvenile Court Act, Ill. Rev. Stat. 1985, ch. 37, § 702-4, that the minor was neglected and abused. The court also found, pursuant to section 2-5 of the Juvenile Court Act, Ill. Rev. Stat. 1985, ch. 37, § 702-5, that the minor was dependent. Thus, the minor was made a ward of the court pursuant to section 1-4 of the Juvenile Court Act, Ill. Rev. Stat. 1985, ch. 37, § 701-4(b). Finally, the court found, in its dispositional order, pursuant to section 5-9(2) of the Juvenile Court Act, Ill. Rev. Stat. 1985, ch. 37, § 705-9(2) and section 1 of the Adoption Act, Ill. Rev. Stat. 1985, ch. 40, § 1501 that petitioners were unfit parents. Petitioners' parental rights were terminated, the minor was removed from petitioners' custody, and the minor was placed in the custody and guardianship of the

Illinois Department of Children and Family Services with the guardian being granted the power to consent to the adoption of the minor.

Petitioners appealed to the Illinois Appellate Court, Fourth District. The appellate court affirmed the order of adjudication and the dispositional order of the circuit court in an unpublished order.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I.

THIS COURT SHOULD DECLINE TO GRANT REVIEW IN THIS CASE WHERE PETITIONERS DID NOT ADVANCE THE CONSTITUTIONAL ISSUES IN THE COURT BELOW.

The respondent respectfully requests this Court to deny the Petition for Writ of Certiorari to review the decision of the Illinois Appellate Court, Fourth District, insofar as petitioners failed to raise in the court below the constitutional issues now sought to be advanced. In seeking a writ of certiorari in this case, petitioners advance three reasons for granting the writ. However, the questions were neither advanced below by petitioners nor passed upon by the appellate court.

This Court's certiorari jurisdiction over decisions of state courts is derived from 28 U.S.C. § 1257 which provides that

> [f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

> (3) By writ of certiorari, . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties, or statutes of . . . the United States.

It is clear that this Court is vested with no jurisdiction unless the federal question had been both raised and decided in the state court below. "If both of these requirements do not appear on the record, the appellate jurisdiction fails." *Crowell v. Randell*, 10 Pet. 368, 392 (1836). Although the apparent rule of *Crowell* that the federal claim be both raised and decided in state court has not been strictly followed, this Court has not departed from the rule that a claim will not be considered unless it has been either raised or squarely considered and resolved in state court. *State Farm Mutual Automobile Insurance Co. v. Duel*, 324 U.S. 154, 160 (1945) ("since the [State] Supreme Court did not pass on the question, we may not do so.") In *Hill v. California*, 401 U.S. 801 (1971), this Court held that where counsel for Hill conceded at oral argument that the constitutional issue was neither raised at trial nor raised, briefed, or argued in the California appellate courts, the issue was not properly before this Court for review. Thus, this Court "cannot decide issues raised for the first time here." *Tacon v. Arizona*, 410 U.S. 351, 352 (1973).

In the case at bar, this Court lacks jurisdiction to review the decision of the state appellate court where petitioners failed to raise the federal issues now sought to be advanced. Rather, the petitioners argued that the evidence adduced at the hearing in the circuit court was inadequate under Illinois law to terminate their parental rights. Specifically, petitioners made the following arguments:

I.

THE STATE DID NOT PROVE THAT PAUL ENSIGN, JR., A MINOR CHILD, WAS NEGLECTED OR ABUSED UNDER ILLINOIS REVISED STATUTES, CHAPTER 37, SECTION 702-4(2).

II.

THE STATE DID NOT PROVE THAT PAUL ENSIGN, JR., A MINOR CHILD, WAS A DEPENDENT MINOR.

III.

THE STATE DID NOT PROVE THAT PAUL ENSIGN, SR. AND PATTI ENSIGN WERE UNFIT PARENTS BY CLEAR AND CONVINCING EVIDENCE.

A. THE STATE DID NOT PROVE THAT PATTI AND PAUL ENSIGN, SR. FAILED TO MAINTAIN A REASONABLE DEGREE OF INTEREST, CONCERN OR RESPONSIBILITY AS TO THE WELFARE OF PAUL, JR.

B. THE STATE FAILED TO PROVE THAT PATTI AND PAUL ENSIGN, SR. SUBSTANTIALLY NEGLECTED THEIR SON, REPEATEDLY.

C. THE STATE DID NOT PROVE THAT PATTI AND PAUL ENSIGN, SR. FAILED TO PROTECT THEIR SON FROM CONDITIONS WITHIN HIS ENVIRONMENT THAT WERE INJURIOUS TO HIS WELFARE.

D. THE STATE FAILED TO PROVE BY CLEAR AND CONVINCING EVIDENCE THAT PATTI AND PAUL ENSIGN, SR. DID NOT DEMONSTRATE A REASONABLE DEGREE OF INTEREST, CONCERN OR RESPONSIBILITY AS TO THE WELFARE OF A NEWBORN CHILD DURING THE FIRST THIRTY DAYS OF BIRTH.

E. THE STATE DID NOT PROVE BY CLEAR AND CONVINCING EVIDENCE THAT PATTI AND PAUL ENSIGN, SR. WERE UNABLE TO DISCHARGE THEIR PARENTAL RESPONSIBILITIES DUE TO MENTAL RETARDATION.

(Brief and Argument for Appellant at 1-4) Where petitioners only presented the above claims in the court below and failed to raise the constitutional issues, this Court should deny review of the questions now sought to be presented.

II.

PETITIONERS' RIGHTS TO DUE PROCESS AND EQUAL PROTECTION WERE NOT VIOLATED WHEN THEIR PARENTAL RIGHTS WERE TERMINATED UPON A FINDING THAT THEIR MENTAL ILLNESS PREVENTED THEM FROM DISCHARGING THEIR PARENTAL RESPONSIBILITIES.

Petitioners initially argue that their rights to due process and equal protection were violated when their parental rights were terminated without a finding of either fault or intentional neglect or abuse of their child. (Petition for Writ of Certiorari at 6) They contend that this procedure results in termination based solely on their status of being mentally ill. Petitioners make this proposition without any direct authority.

Respondent agrees that a parent's rights cannot be terminated solely due to his or her mental retardation or illness. If, however, the mental illness or other mental or emotional disability precludes that parent from providing proper parental care and defeats all reasonable efforts to remedy the condition which led to a determination that a parent is unfit, then termination is appropriate.

Ill. Rev. Stat. 1985, ch. 40, § 1501(D)(p). Under this statutory scheme, there is no violation of due process or equal protection where termination of parental rights can result only when the parent's mental illness manifests itself in conduct demonstrating a present and future inability to care for the child. It is the parent's conduct and relationship with the child, not the parent's status, that forms the basis for terminating parental rights. *In re Guardianship and Custody of Nereida S.*, 57 N.Y.2d 636, 439 N.E. 2d 870 (1982).

In the case at bar, petitioners' parental rights were not terminated because of their mental illness, but rather because their mental illness precluded them from providing proper parental care. The record demonstrated that petitioners were unable to give proper physical or emotional care to their child even with extensive assistance and guidance and thus were unable to discharge their parental responsibilities. There was clear and convincing proof that petitioners' mental disability was directly related to deficient parenting. The lower court stated:

> The undisputed evidence, as presented by the psychologists and the other trained professionals who were involved in this case, is that [petitioners'] conditions of severe mental impairment will not be alleviated in the foreseeable future. The minor is at high risk for developmental delay and retardation, and these conditions are likely to manifest themselves in the future, thereby increasing the amount of care the minor will need. As the [petitioners'] parenting skills remain static and the minor's need for care and stimulation increases, [petitioners'] abilities to discharge their responsibilities would consequently be diminished even further.

(Appendix to Petition for Writ of Certiorari at 15c)

The statutory scheme provided sufficient procedural safeguards for the protection of petitioners' parental rights and authorized the termination of petitioners' rights only when specific criteria were satisfied. The statute does not violate petitioners' rights to due process and equal protection since termination can only result from a specific finding of unfitness made subsequent to a hearing. Where petitioners' parental rights were terminated based upon a finding of unfitness due to their conduct, rather than their status as persons with mental illness, this Court should deny further review of this cause.

III.

THIS COURT SHOULD DENY REVIEW OF THE CLAIM THAT PETITIONERS WERE DENIED DUE PROCESS AND EQUAL PROTECTION WHEN THE STATE TERMINATED THEIR PARENTAL RIGHTS WITHOUT CONSIDERING WHETHER THE STATE'S INTEREST COULD BE PROTECTED BY OTHER, LESS INTRUSIVE ALTERNATIVES WHERE THEY FAILED TO ADVANCE THE CLAIM BELOW.

Petitioners further claim that the constitutional requirement of due process and equal protection was not met when the State terminated petitioners' parental rights without considering whether the State's interest could be protected by other, less intrusive alternatives. (Petition for Writ of Certiorari at 9-11) Respondent maintains this Court should deny review of this claim where petitioners failed to advance any claim, constitutional or otherwise, with respect to whether petitioners' parental rights could be terminated without a finding that the State's interest could not be protected by other, less intrusive alternatives. Because of this failure to specifically raise the claim below, the court had no reason to address the issue in

its order affirming the judgments of the circuit court. This Court should decline to grant petitioners initial review of the contention.

Notwithstanding petitioners' failure to advance the claim below, the record amply demonstrates that alternatives to the termination of petitioners' parental rights were tried, but that the alternatives failed to ameliorate the situation. Although petitioners received assistance in learning parenting skills from health care professionals, petitioners failed to retain these skills even with repetition. Although the liberty interest in maintaining a familial relationship with one's child is indeed fundamental, *Stanley v. Illinois*, 405 U.S. 645 (1972), the circuit court had no available option other than the termination of petitioners' parental rights when these efforts to assist petitioners failed. This Court should decline to provide further review of this cause where there was substantial evidence to support the determination of the court below affirming the judgment of termination.

IV.

PETITIONERS' RIGHTS TO DUE PROCESS AND EQUAL PROTECTION WERE NOT VIOLATED WHERE THE COURT BELOW FOUND THAT THERE WAS CLEAR AND CONVINCING EVIDENCE TO SUPPORT THE FINDING OF UNFITNESS.

It is well settled and the respondent fully acknowledges that due process requires that before parental rights may be terminated, the State must demonstrate the parents are unfit by at least clear and convincing evidence. *Santosky v. Kramer*, 455 U.S. 748, 769 (1982). This Court in *Santosky* stated that this standard is necessary to convey to the factfinder the level of certainty about its fac-

tual conclusions necessary to satisfy due process. *Id.* The lower court in the case at bar held that the trial court's findings of parental unfitness were supported by clear and convincing evidence. (Appendix to Petition for Writ of Certiorari at 15c-16c) Petitioners seek review by this Court where they argue that

> [t]he State violated these Petitioners' due process and equal protection rights through its finding of unfitness and termination of these Petitioners' parental rights without the necessary clear and convincing evidence to support those decisions.

(Petition for Writ of Certiorari at 13) Respondent maintains the Petition for Writ of Certiorari should be denied where the issue involves a question as to the particular application of well-defined decisional law of this Court to the facts of the case. Further review of this cause is unnecessary since the decision below does not depart from established precedent. The court below fully considered the claim in view of the constitutional standard and correctly decided the issue.

Pursuant to section 5-9(2) of the Juvenile Court Act (Ill. Rev. Stat. 1985, ch. 37, § 705-9(2)), the court may terminate parental rights upon finding that the parents are unfit as defined in section 1D of the Illinois Adoption Act (Ill. Rev. Stat. 1985, ch. 40, § 1501(D)), which provides, in pertinent part, as follows:

> D. 'Unfit person' means any person whom the court shall find to be unfit to have a child, without regard to the likelihood that the child will be placed in adoption, the grounds of such unfitness being any one or more of the following:
>
> * * *

(b) failure to maintain a reasonable degree of interest, concern or responsibility as to the child's welfare;

* * *

(d) substantial neglect of the child if continuous or repeated;

* * *

(g) failure to protect the child from conditions within his environment injurious to the child's welfare;

* * *

(l) failure to demonstrate a reasonable degree of interest, concern or responsibility as to the welfare of a new born child during the first 30 days after its birth;

* * *

(o) repeated or continuous failure by the parents, although physically and financially able, to provide the child with adequate food, clothing, or shelter;

(p) inability to discharge parental responsibilities supported by competent evidence from a psychiatrist or clinical psychologist of mental impairment, mental illness or mental retardation as defined in Section 1-116 of the Mental Health and Developmental Disabilities Code, or developmental disability as defined in Section 1-106, of that Code, and there is sufficient justification to believe that such inability to discharge parental responsibilities shall extend beyond a reasonable time period.

The trial court entered a finding of parental unfitness pursuant to subsections (b), (d), (g), (l), (o) and (p) of section 1D of the Adoption Act (Ill. Rev. Stat. 1985, ch. 40, §§ 1501D(b), (d), (g), (l), (o), (p)).

The trial court's findings of unfitness were premised upon the following facts: Petitioner's father dropped the child at the age of eleven or twelve days, and petitioners

took no action on their own to attend to the child's physical condition. Although repeatedly instructed regarding the proper feeding and hygiene of the child, petitioners were unable to master these basic tasks. Petitioners left dangerous objects such as medication within the reach of the child and petitioners failed to comprehend that this could be dangerous to the child. In the opinion of the testifying psychologists, petitioners were unable to recognize and appropriately respond to medical emergencies which may arise. Finally, petitioners were unable to provide appropriate emotional and physical stimulation for the child.

The trial court was confronted with a most difficult factual situation and reached its decision with sensitivity and concern. After careful consideration, the court found the petitioners to be unfit parents and terminated their parental rights. The decision was supported by clear and convincing evidence and no error is present which would warrant further review by this Court.

CONCLUSION

In view of the foregoing reasons, respondent respectfully requests this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

NEIL F. HARTIGAN
Attorney General, State of Illinois
SHAWN W. DENNEY
Solicitor General, State of Illinois
TERENCE M. MADSEN *
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 917-2235
Attorneys for Respondent

KENNETH A. FEDINETS
Assistant Attorney General
Of Counsel

* Counsel of Record

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CLERK

No. 87-135

In The
Supreme Court of the United States
October Term, 1987

PATTI AND PAUL ENSIGN,
Petitioners,

v.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE APPELLATE COURT OF ILLINOIS,
FOURTH DISTRICT

PETITIONERS' REPLY IN RESPONSE TO RESPONDENT'S BRIEF IN OPPOSITION

MICHAEL P. SENG
315 South Plymouth Court
Chicago, Illinois 60604
(312) 427-2737
Counsel of Record

Of Counsel:
BARBARA J. HEATHFIELD
MICHAEL S. HARLEY
CAROL J. BELL
PROTECTION AND ADVOCACY, INC.
175 West Jackson Blvd.,
Suite A2103
Chicago, Illinois 60604
(312) 341-0022

Pandick Technologies, Inc., Chicago • (312) 236-0200

REPLY TO THE RESPONDENT'S QUESTIONS PRESENTED FOR REVIEW

1. This Court should grant review in this case because Petitioners properly advanced the federal constitutional issues in the courts below.

2. This Court should grant review because Petitioners' rights to due process and equal protection were violated when the termination of their parental rights was ultimately based upon their status as persons with mental handicaps, rather than their conduct as parents.

3. This Court should grant review in this case because the issue of a less intrusive alternative to termination of parental rights was properly raised at trial, in the Appellate Court of Illinois and in the Petition to the Illinois Supreme Court.

4. Petitioners' rights to due process and equal protection were violated when they were found to be unfit parents and their parental rights were terminated with no evidence on the record to support such a finding.

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No. 87-135

In The
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PATTI AND PAUL ENSIGN,

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v.

PEOPLE OF THE STATE OF ILLINOIS,

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE APPELLATE COURT OF ILLINOIS,
FOURTH DISTRICT

PETITIONER'S REPLY IN RESPONSE TO RESPONDENT'S BRIEF IN OPPOSITION

Prior to addressing the specific points raised by Respondent in its Brief in Opposition, Petitioners wish to clarify that, while they are mentally handicapped, they neither are, nor are they considered to be, mentally ill. Respondent does discuss Petitioners in terms of mental illness and Petitioners believe it is very important that this Court understand that they are actually highly functioning persons with mental retardation.

I.

Respondent raised four (4) questions for this Court's consideration in determining whether to grant review in this case. First, Respondent alleges that Petitioners failed to advance their constitutional issues in the courts below, thus this Court should decline review for jurisdictional reasons. However, Petitioners did raise each and every constitutional issue at trial and at the Appellate and Illinois Supreme Court levels of review. The State of Illinois has had four (4) meaningful opportunities to consider and decide the constitutional claims in this case. In fact, the Appellate Court of Illinois did address some of them in its opinion. (Appendix to Petition For Writ Of Certiorari at 16c) Petitioners have included in the Appendix to this Reply the Motion For New Hearing that was granted by the trial court and which outlines every constitutional claim raised to this Court, Petitioners' Request for Rehearing to the Appellate Court of Illinois that discusses the constitutional issues in detail, and finally, the Petition For Leave to Appeal that Petitioners filed in the Supreme Court of Illinois, that also discusses in detail the constitutional issues raised here.

The Appendix to the Reply should amply demonstrate to both this Court and Respondent that the constitutional questions at issue here have been properly "raised, briefed and argued" (Respondent's Brief in Opposition at 4) at each and every state court level, including trial, Appellate and the Illinois Supreme Court. While Petitioners were not granted the opportunity to *argue* these issues to the Illinois Appellate and Supreme Courts, they were both raised and briefed at those levels. Since Petitioners did properly raise these federal constitutional issues in the courts below, this Court should grant review of the questions as they are properly within its jurisdiction.

II.

Respondent next argues that it was Petitioners' conduct that led to the termination of their parental rights, rather than their status as persons with mental handicaps. However, Respondent quotes the Illinois Appellate Court's discussion of Petitioners' mental handicap in support of its contention, rather than any discussion of *conduct* on the part of Petitioners. As Petitioners have repeatedly argued, an examination of their "conduct and relationship with the child" (Respondent's Brief In Opposition, at 7) would have led to the retention of their parental rights, rather than termination. A close scrutiny of the evidence adduced at trial reveals that with appropriate and available services, Petitioners are capable of raising their child.

III.

Respondent's third argument is that this Court should deny review of the claim that Petitioners were denied due process and equal protection when the state terminated their parental rights without considering whether the state's interest could be protected by other, less intrusive alternatives. Respondents allege that Petitioners failed to advance this claim below. Petitioners are pleased that Respondent agrees that no consideration was given to less drastic alternatives. The presence of this issue properly raised and briefed in the documents in the Appendix places this issue squarely before this Court, in light of Respondent's agreement that the State acted improperly in failing to consider less intrusive alternatives, thereby violating Petitioners' constitutional rights.

IV.

Respondent supports the opinion of the Illinois Appellate Court in arguing that there was evidence to support the trial court's finding of unfitness. However, Respondent fails to address Petitioners' arguments that the findings it cites at page 12 of its Brief in Opposition, not only were unsupported by clear and convincing evidence, but are perplexing considering the evidence on the record that the child was loved, happy, healthy, thriving and developing normally. (R. 159, 105, 213)

Petitioners are aware that this Court will not normally review findings of fact made by a lower court. Petitioners are also aware that this Court will review such findings when no evidence supports the lower court's conclusion. The facts on the record Petitioners' abilities and performance and the excellent condition of the child, demonstrate that no evidence of unfitness was ever adduced by the State.

CONCLUSION

This Court should grant review in this case because jurisdiction was properly invoked under 28 U.S.C. § 1257(3), and Petitioners' rights to due process and equal protection under the law were violated by the actions of the State of Illinois.

Respectfully submitted:

MICHAEL P. SENG
315 South Plymouth Court
Chicago, Illinois 60604
(312) 427-2737
Counsel of Record

Of Counsel:
BARBARA J. HEATHFIELD
CAROL J. BELL
MICHAEL S. HARLEY
PROTECTION AND ADVOCACY, INC.
175 West Jackson Blvd.,
Suite A-02103
Chicago, Illinois 60604
(312) 341-0022

Appendix A

IN THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT, ILLINOIS
MOULTRIE COUNTY, JUVENILE DIVISION

In the Interest of PAUL ENSIGN, JR.,
A Minor.

No. 85-L-24

MOTION FOR NEW HEARING

Now come the parents of the minor, PAUL ENSIGN, JR, PATTY ENSIGN, and PAUL ENSIGN, Sr., and move this court to grant a new hearing and in support thereof allege as follows;

1. That both an Order of Adjudiction and a Dispositional Order were entered herein on January 14, 1986.

2. That no Dispositional Hearing was held in said cause.

3. That significant factors could be presented to the court concerning the welfare of the child at a dispositional hearing.

4. That the state failed to carry the burden of proof required by law in order to terminate parental rights.

5. That the state is required to prove the parents unfit by clear and convincing evidence and that level of proof was not attained at the one hearing held in this cause.

6. That the court, in announcing its decision indicated that the State had proven that the child was abused and neglected by a preponderance of the evidence and that fault was proved by clear and convincing evidence.

7. That the court applied the wrong standards to the instant case and made no specific findings of record that either parent was an unfit parent.

8. That in the absence of a specific finding of unfit-

ness of either parent the child should be restored to the parents pending a dispositional hearing.

9. That the state was permitted to introduce evidence at the hearing concerning the disposition of the cause in the form of testimony from David Cole that adoption was a strong possibility for the minor.

10. That this was designed to be a bifurcated hearing and the parents did not anticipate that the dispositional hearing would be conducted simultaneously with the adjudicatory hearing. This resulted in the state getting in testimony about the adoption but the parents not presenting information about the disposition of the cause which resulted in a hearing which deprived the parents of the opportunity to apprise the court of their evidence concerning the proper disposition of the cause.

11. That the acceptance of said testimony undly (sic) prejudiced the court toward adoption without the other parties being given the opportunity to present testimony concerning the disposition of the cause.

12. That the Adoption Act, Ill. Rev. Stat., 1983, Ch. 40, par. 1501D(p) is unconstitutional as it was applied in this case. The proceedings in this particular cause violated the Due Process clause and the Equal Protection Clause of the United States Constitution and violated Article I, Sec. 2 of the Constitution of the State of Illinois in the following manner:

A. There is an insufficient amount of guidance provided concerning what would constitute a reasonable time period for the parents to be incapable of discharging parental responsibilities. In the instant case, the testimony showed that the parents had made great strides in their parenting skills and were continuing to make progress. The statute does not take permit a court to take into consideration the progress that the parents are making toward good parenting skills. For these reasons the statute itself is unconstitutionally vague.

B. In the instant case, the court did not make a specific finding of unfitness, nor did the court state that a finding was made that the parents were unable to discharge parental responsibilities at the time of the hearing. Nor did the court make a specific finding that there was sufficient justification to believe that the inability to discharge parental responsibilities would continue beyond a reasonable time period. In spite of the lack of specific findings to that effect, the court terminated parental rights to the child placed the child in the custody and guardianship of the Department of Children and Family Services and granted authority to the Department to consent to the adoption of the child. The parents contend that such action clearly violates the Due Process rights of the parents since the right to raise one's own child is a constitutionally protected right.

C. That if findings were made that the parents were unfit such findings would be against the manifest weight of the evidence in this cause.

D. That the granting of adoption rights in the instant cause was wholly uncalled for under the facts and circumstances of the case. All of the testimony showed that the parents loved the child and cared for the child and did the best that they could to help the child. The state has shown no compelling state interest concerning the necessity of the adoption of the child. For the Court to order that the child was to be taken from his parents and placed for adoption if an adoptive home was available denies the parents of their constitutional right to form family relationships and no showing was made that that was necessary under the facts of this case. Even if the child were to be maintained in a foster home there is no reason to break the established parent child relationship.

E. Since there was no dispositional hearing the court did not consider other placement options.

F. Since there were findings of abuse and neglect

and further findings of fault, as indicated by the record an impermissible category has been created by the court which discriminates against these parents simply because of the mental retardation. The categories created are parents who abuse and neglect their children who are not retarded and those parents who abuse and neglect their children who are retarded. In cases of parents who are not retarded they are given an opportunity to resolve the problems which led to the abuse and neglect through working with counselors and/or the Department of Children and Family Services. As applied in the instant case, the Court appears to have made findings of abuse and neglect and to have terminated parental rights because the parents were retarded without specifically stating that findings were made that the parents were unfit because of their retardation. There is no showing from the statements made by the court on the reocrd (sic) that the court considered the proper factors in terminating the parental rights of these parents.

13. That because of the errors at the said hearing the parents of the minor child should be given a new hearing.

WHEREFORE, the parents of the minor child request that the court vacate the earlier proceedings, hold individual hearings concerning the fitness of the parents, and adjudicatory hearing, and, if necessary, a dispositional hearing, and that the court will order the child to be returned to the parents under the supervision of the Department of Children and Family Services until this case can be resolved.

PATTY ENSIGN,
PAUL ENSIGN, Sr.

/s/ SHARON A. BUCKLER
SHARON A. BUCKLER

/s/ OLIVER ELDER
OLIVER ELDER

The undersigned certifies that a copy of the foregoing was hand delivered to the office of the Moultrie County State's Attorney and mailed to the other Attorneys of Record on the 11th day of February, 1986.

/s/ SHARON A. BUCKLER
SHARON A. BUCKLER

Appendix B

4-86-0261

In The

Appellate Court of Illinois

Fourth District

IN THE INTEREST OF:
PAUL ENSIGN, JR.

THE PEOPLE OF THE STATE OF ILLINOIS,
Petitoner-Appellee,

vs.

PAUL ENSIGN, SR. AND PATTI ENSIGN,
Respondent-Appellant.

Appeal from the Circuit Court of the Sixth Judicial Circuit, Moultrie County, Illinois

Trial Court No. 85-L-24

Honorable
W.B. Kranz
Judge Presiding

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I. INTRODUCTION

Petitioner Appellants respectfully request rehearing pursuant to S. Ct. Rule 367, and further state that this Court has overlooked errors of law and fact made by the trial court; that this court has misapprehended points of law and fact and has overlooked the question of constitutional law contained herein..

Appellant further petitions this Court to provide guidance as to the application and interpretation of an Illinois statute, namely, Ill. Rev. Stat. 1985, ch. 40, par. 1501 D (p), so as to give effect to Appellants' federal constitutional rights, since this is a case of first impression.

The specific question at law is whether the state has a compelling state reason to justify termination of parental rights, absent any past or present evidence of abuse or neglect, pursuant to subsection (p), and in the instant case, whether termination of Appellants' parental rights was the least restrictive means to advance legitimate and compelling state interest.

II. ERROR OF FACT

> The decision of the Court was not sustained by the evidence, and is against the weight of the evidence.

This court determined that the trial court's finding of unfitness pursuant to section 1D (b), (d), (g), (i), (o) Ill. Rev. Stat. 1985, ch. 40, par. 1501 D (b), (d), (g), (i), (o) are all interrelated and based upon the same facts in evidence. Appellants agree, but further aver that the facts in evidence are insufficient to sustain a finding of unfitness that the vast weight of the evidence clearly establishes that the parents neither neglected the minor child, nor were they incapable of learning ways to improve their parenting skills. (A. Op. 18)

This Court's finding that Respondent failed to provide proper care for the minor cited four (4) particular areas: (A. Op.13)

1) Respondents were unable to properly feed the child.

Joy Colclasure, a townswoman testified in response to the question of food in the house, that, "... there really wasn't much there." (R. 15) She further stated that she brought the Respondents "ready mix formula," and asked Respondents to keep the bottles so that the amount of formula consumed by the child could be assessed. Respondents did not, she testified, comply with her wishes. (R. 15) However, she later testifies on cross examination and contradicts this testimony about the bottles, and testifies that the baby "obviously had had something to eat," (R. 21) and that the used bottles were in evidence, in the refrigerator, the sink, or thrown away. (R. 22.) She further testifies on cross examination that she had not been involved with infant feeding theories and answered affirmatively that based on her delivery of formula, and the empty bottles found, that there was no question that the child was eating and being fed. (R. 25-26)

Joanna Cole, the county health nurse testified that Respondents picked up the WIC vouchers every month, which entitled them to get food for the infant and that they came by themselves. (R. 35) She further testifies that the baby was gaining weight and was growing. (R. 40)

Suzanne Wainscott, a degreed R.N., who was the home interventionist for the birth to three program, (R. 94-95) testified that she was always told by Respondents that the child had two bottles, but that she knew it was either more or less than two. (R. 99) How she "knew" this is not explained. When questioned directly about proper weight gain, she stated that just by looking at him, it was observable that he gained weight. (R. 112)

State's witness, Ronald Matthew, Ph.D., licensed as a Clinical Psychologist, testified that Respondents were capable of feeding the child. (R. 131)

Virginia Dauz, M.D., a pediatrician, who had seen and

examined the child 4 times between the ages of 2½ months and 9 months, (R. 154-157) testified that the baby was gaining weight within the normal range, that he was clean and dressed appropriately. (R. 159)

It is interesting to note that Joanna Cole testified that while she had not determined exactly how much formula was fed to the baby, she grudgingly admitted that the weight gain showed he had been eating and he was developing physically. Her further statement that "... the formula was gone somehow," is another example of the unwillingness to recognize the accomplishments of the Respondents in caring for their child. (R. 44) Further, Nurse Cole testifies that she has no experience with mentally retarded persons other than casual, that her contact was not sustained, with Respondents, (R. 47) and she did not know what progress Respondents had made with the DCFS housekeeper. (R. 48)

This betrays the prejudicial tone of the state's witnesses that nothing positive with respect to the parent/child relationship was the result of the respondents' efforts or learning, but was instead, something that could be characterized as dumb luck..

Suzanne Wainscott offered that the child was eating solid foods (R 105) and that the Respondents' learned to buy baby food by looking at the labels on the jars. (R. 106-107)

While all parties involved with counting empty bottles complained that the bottles were not kept by Respondents, not one person testified that the child was not fed, nor did even one witness testify that the infant failed to thrive or that he looked unhealthy. Although the Court concludes that the Respondents were not able to properly feed the child, 5 witnesses, all but one for the state provided clear evidence Respondents were able to feed and did feed the child properly.

2) Respondents were unable to properly regulate the temperature in their apartment. (APE. 13)

Appellant is unable to ascertain the significance of the purported 'too hot" temperature of Respondents' apartment. Two inferences in the record exist as to the temperature. Joy Colclasure testified that the heat was, "much, much, much too high!" When questioned as to the actual temperature, she imagined it had to be, "85 or so, really, really, really warm." (R. 18) The second reference is made by Suzanne Wainscott, who testified that the thermostat was set at approximately 90 degrees and the room temperature was "around eighty." However, she said they opened the windows instead of turning down the the thermostat. (R. 101-102)

The inference drawn by the Court was the inability of the Respondents to learn to regulate the thermostat. An equally valid inference is that they had an infant in the home who needed more warmth then the adults complaining about the temperature, or even that they liked to open the window to get some air and kept the heat up to prevent the apartment from becoming too cold.

Totally absent from the record is any evidence that harm resulted to the child or that 80-85 degree indoor temperatures in the winter were unhealthy or contraindicated for an infant.

3.) Respondents were unable to recognize and appropriately respond to medical emergencies. (A. Op. 13)

The only "medical emergency" that could be construed from the record is the incident of the fall of Paul, Jr. from the infant seat. Although there was not a scintilla of evidence that this accident caused any physical or emotional harm to the child, this incident ballooned into negative presumptions about the parents' ability to care for their child, ultimately leading to the termination of their parental rights.

Nancy Robbins was the only eyewitness to the accident who testified for the state. She stated that Paul Ensign was carrying the infant seat in his arms, he stopped, attempted to get a better purchase on the seat and while balancing it on his knee, the baby slid to the ground from a distance of Respondents' waist to the ground, estimated to be 3 feet. (R. 6) She further testified on cross examination, that the baby landed first on his feet. (R. 10) Paul said something to Patti which was not understood by the witness. (R. 11)

The issue which then was examined by the state's witnesses was, had the baby been taken to the doctor? The county nurse, Joanna Cole, testified that she saw the infant about 2 hours after the accident and "no injury appeared, I didn't find any contusions or bruises at all." To "be on the safe side," she had the Sullivan police transport the child to an unnamed doctor. (R. 30) No doctor was produced at the trial to testify about the examination, and it is admitted that there was no injury.

The child sustained no injury in this accident. How then were Respondents expected to respond in order to appear "appropriate," to this alleged medical emergency. The record is absent of any evidence whatsoever to conclude that the Respondents' response was inappropriate or that any other medical emergency arose which the Respondents failed to cope with in an appropriate way. In the words of Rennie Willoughby, accidents happen to any family. (R. 227)

Indeed, Daile Rozene stated, when questioned about Respondent father's ability to recognize dangerous situations and potential hazards and avoid them, that he, Respondent-father, uses "good common sense in his work." Recognizing that farming is a hazardous occupation, the witness stated that Respondent-father has never been injured on the farm. (R. 168-169) Respondent has worked for this witness for 15 years. (R. 162) The State on cross examination established that Respondent is a good

employee who follows the instructions of his employer. (R. 168-169)

Apparently, Mr. Rozene's judgment of Respondent's "good common sense" was sufficient to entrust his tractor, pickup truck, and his grain harvest to him. It also appears Respondent had possession of a valid driver's license. (R. 163-170)

The weight and sufficiency of the evidence given by Mr. Rozene, who employed the Respondent for 15 years, appears to have been totally ignored by the trial court. Mr. Rozene's characterization of Respondent is not consistent with an inability to recognize and respond to medical emergencies.

It is totally implausible to infer that this Respondent was unable to adjust a thermostat or to know when his son was injured and required medical assistance. In fact, it is explicit in Mr. Rozene's testimony that Respondent himself sets the cylinder mechanically to determine the depth of ground to be cultivated or disced.

Finally, this Court has found that Respondents failed to provide proper care for the minor because:

4) **They were unable to provide adequate emotional and physical stimulation. (A. Op. 13)**

It is unclear to appellants how the Court determined Respondents were unable to provide adequate emotional and physical stimulation. Searching the record, we conclude that Wainscott's inference that the parents were incapable of learning to turn the baby because the back of his head was flat (R. 103-104) may have accounted for the Court's conclusion. However, that conclusion is directly contradicted by the testimony of Dr. Dauz, the child's pediatrician, when she stated that the child "had a flat, what I call brachycephalic head which is kind of a flat head expecially of the back. . ." (R. 155) and could not attribute it specifically to the failure of the parents to turn the baby.

There is testimony that the parents hold the baby, allow freedom of movement and that his growth and development were normal. Additionally, Appellant found in the record, testimony by Dr. Gillespie that she believed that any child stimulation programs would be helpful and specifically mentioned Head Start. She further states that such early intervention programs are effective for children at high risk. (R. 84) At all times Respondents cooperated fully with the early intervention program provided.

This Court found abuse based upon an environment injurious to the child's welfare, namely, he was dropped accidentally; Respondents failed to recognize potentially dangerous conditions in and around the home, i.e., Respondents leaving dangerous items such as medicine within reach of child; and Respondents' "severely limited ability" to recognize and respond to medical emergencies that might arise. (A. Op. 14)

The related finding of the accident, when the child was dropped, and Respondents' limited ability to respond to medical emergencies that might arise, have been discussed previously and need not be reiterated here.

The finding that the parents could not recognize to correct potentially dangerous conditions in and around the home is not supported by the evidence in the record. This finding appears to be based upon medicine bottles being left on the floor, an observation made by state's witness Wainscott. She testifies that she felt the infant to be too confined and instructed Respondents to remove Paul, Jr. from the crib and playpen so he could develop motor skills. (R. 102) They apparently followed the instructions because Nurse Wainscott further testifies that she instructed Respondents to move medicines off the floor so the infant could not reach. them. She observed "one time it was in a childproof container. One time it was not in a childproof container." (R. 100) There is no record that other than these two occasions, it ever occured again. In fact,

Rennie Willoughby, the homemaker assigned to work with the Respondents by DCFS, testified that she instructed the Respondents to move electrical cords off the floor and to cover electrical outlets for the protection of the child. She went out to lunch and returned an hour later, whereupon she observed that all of these instructions had been fully complied with. (R. 220) She futher testifies clearly as to the learning ability of these parents, no debris was littered on the floor, although there was sometime "stuff" on the floor. (R. 220) Respondents learned not to give the child a bottle while he was lying flat on his back, thus avoiding ear infections. (R. 223-224) Respondents watch the child closer, they vacuum the floor more often, they shampoo the carpet. (R. 227) Indeed she testifies that the child is "overly cared for," one or both of the Respondents are with him constantly, always. (R. 217) There is testimony by Respondent, Paul Ensign that, with respect to the hole in the screen door, and the possibility of the child tumbling down 2 flights of stairs that "he (the child) don't go out the door, we lock the door." (R. 246) To infer that this was an inappropriate response to prevent injury to his son is simply absurd. To further infer that he lacked the mental capacity to see or understand the potential risk is totally unsupported in the record.

While Appellant is acutely aware that the trial court will not be overturned unless it is contrary to the manifest weight of the evidence, and the credibility of the witnesses is left with the trier of facts, credibility alone, without facts to support findings is not legally sufficient.

A careful examination of the record raises serious questions about the weight of the testimony given by a Certified Psychologist, Dr. Matthews, who testified that the local mental health center could provide parent training services, that the Respondents were capable of acquring those skills, but that the Respondents never received them, and that supplemental assistance for the child's intellec-

tual development was also locally available. (R. 127-134) This is supported by the testimony of the defense witness, Vicki Baxter, the social worker assigned to the family by DCFS. She testified that her recommendation was that the parents should receive, and would benefit from, the parenting classes at the mental health center, which ranged from individual to group instruction. She observed that they learned how to regulate the temperature of the baby's milk, learned to put important dates on the calendar so they would not forget them, and they called unfailingly to ask for instruction. (R. 198-200)

Further testimony established that the Respondents clearly loved the child, played with him, held him and cared for him. (R. 201) This testimony, together with Dr. Matthews' about the Respondents' potential appears to be completely ignored. It would appear that the only portion of Baxter's testimony regarded as credible was her statement that, the parents "probably" do not provide as much attention and hold the child as "probably" most parents do. (R. 201)

Appellant believes that the Court mistakenly construed the testimony to be evidence that Respondents did not provide enough attention to the child's emotional development. (A. Op. 9)

III. ERROR OF LAW

Since the factual findings of unfitness by the trial court are against the manifest weight of the evidence on record, the finding of unfitness rests solely upon Ill. Rev. Stat., 1985, ch. 40, par. 1501 D, (P). In the instant case, the application of subsection (P) resulted in the establishment of a classification which violates equal protection and the effect of this law as applied creates the classification forbidden by *Helvey* v. *Rednour*, 4 Ill. Dec. 671, 408 N.E. 2d 17 (1980), and as a result a different standard was applied to these mentally retarded appellants. Such classifications requires strict scrutiny of the current statue by this Court.

Meyer v. *Nebraska*, 262 US 390, 43 S. Ct. 625, 67 Led 1042 (1923).

Such a strict scrutiny reveals the same problems discussed in *Helvey* (supra). There, the Appellate Court decided that not only was the right of a retarded parent to raise a family constitutionally protected as a fundamental right, but that a finding of continued mental retardation in the future was insufficient to prove the unfitness of the parent in the present. In the absence of findings of past or present patterns or acts of abuse or neglect, the speculation as to future abilities under subsection (P) does not pass constitutional muster.

This Court cites *In Re Stilley*, (1977) 66 Ill. 2d 515, 363 N.E. 2d 820, an Illinois Supreme Court case, in support of its contention that the best interest and welfare of the child is the essential policy consideration in child neglect cases. However, in *Stilley*, (supra) the evidence showed that the parents were drug and alcohol abusers, and that the child had been left to wander away and was left alone at home by the parents. Future speculation about parental care was sustained by actual past acts of the parents. *In The Interest of Brooks*, 63 Ill App. 3rd 328, 379 N.E. 2d 872 (1978) more fully elucidates the necessity of finding an actual act of abuse by parents, and bars speculation about the future care of the child, unless such act or pattern of acts are firmly in evidence.

In the instant case, the state failed to adduce evidence, of both weight and sufficiency, to establish that the Ensign parents were either neglectful or abusive; thus, speculation as to the minor's physcial (sic) problems, and the inability of the Respondents to cope with them, must be established before the court can speculate as to the future ability of the parents to care for the child, i.e., best interest, and is barred absent such evidence.

The fact that subsection (p) of the instant statute requires a finding of inability to discharge parental respon-

sibility based upon competent evidence of a psychiatrist or clinical psychologist, still fails to distinguish it from the statute considered in *Helvey*. Here, the psychologist was used to classify Respondents through test scores, then to generalize the abilities of Respondents to discharge parental responsibilities without *ever* directily observing those abilities. (R 86). Psychologist Gillespie, upon whom the trial court relies, admitted that direct observation is the best evaluative tool, (R. 91) however, she never does so. The trial court relied upon Dr. Gillespie's speculative predictions about the parents' future ability to discharge parental responsiblity without one iota of evidence of either past or present acts or patterns of abuse or neglect. (R. 34, 39, 43, 112, 113, 158, 159)

It also appeared that the trial court disregarded entirely the evidence on the record from both the state and defense witnesses that the parents have learned in the past and could continue to learn in the future to discharge parental responsibility with the assistance of those services they are required by law to seek out for the child. Ill. Rev. Stat. ch. 37, sec. 701-2 (3) (b), and which the child by law, has a right to receive. The record is silent as to any instance wherein this child's right to such services were denied or resisted by respondents.

On the basis of her in-office tests, Dr. Gillespie testified that respondents are and will continue to be, incapable of discharging their parental responsibilities. (R. 73) However, many witnesses who directly observed Respondents with their child testified as to the parents' ability to discharge their parental responsibilities and to continue to learn to do so in the future.

Joy Colclasure stated that there was no question that the child was eating and being fed. (R.25-26) She also stated that there were toys available, (R.23) and that Respondents are very fond of the baby (R.22) and that he was clothed. (R.27-28)

Joanna Cole stated respondents provided food, (R.35) the baby was gaining weight and growing, (R.40) and that there was no evidence of neglect. (R.43) In addition, she stated that the baby was happy and smiling (R.39) and that Respondent knew how to change the baby. This is an error of fact on the part of the Court. In its recitation of the highlights of this witnesses' testimony, the Court states Ms. Cole testified Respondent did not know how to change the baby (A. Op. 3) when in fact, Ms. Cole testified that the Respondent did know how to change the baby.

Suzanne Wainscott testified that they learned to purchase appropriate baby food through recognition of the jars. (R. 106-107) She also testified that there was no abuse of the child (R. 112), and that the baby was thriving. (R. 113) She also agreed that the Respondents were cooperative with her. (R 114)

Dr. Matthews testified that the Respondents were capable of acquiring parenting skills and that the training was available locally. (R. 127-134)

Vicki Baxter also testified that the parents should receive and would benefit from, parenting classes. (R. 198-200) Such direct observation should hold greater weight with this court than the psychologists' opinion, who did not observe Respondents with the child. Witnesses' direct observations are the very evidence that raises these parents out of the mere classification or status found so abhorent in *Helvey*; Test (sic) scores are no substitute for the individual direct observation of respondents' abilities with their child.

Since this Court's other concerns such as ability to adequately feed, clothe and provide medical care for the child should be alleviated by the great weight of the evidence on the record, we can only conclude that the court based its decision on its finding of inability of the parents to provide adequate emotional and physical stimulation. (A. Op. 13) The court goes on to speculate "that because there is poten-

tial risk that this child will be developmentally delayed and may be retarded in the future, the court has applied a standard contrary to *Brooks* (supra) and *Stilley* (supra). This is especially true in light of neuro pediatrician, Dr. Daniel Pochetti's testimony that, to his surprise, despite the fact that this child suffers from microcephalia, the child is not currently developmentally delayed or retarded at all. His development is within normal limits. (R.189)

The wider implications of this Court's decision are fearsome to contemplate. The Court is, as it stated, basing its decision on the future inability of Respondents to meet what it states are the future emotional and physical stimulation needs of the child. Those stimulation needs were in part defined, on the record, by the testimony of psychologist, Dr. Gillespie, wherein she stated:

"I think the level of *stimulation* in the home as it relates to school or everyday living would be so very minimal since *neither one of them can read* and have difficulty counting or computing. A child does much better to have stimulating toys. I don't think they would be aware of *what toys to purchase* or what the *purpose of some of the toys would be to enrich..Speech is very important.* You know, to learn phonics . . . They do have *speech articulation problems.*" (emphasis added) (R.72)

Does this Court contemplate finding unfit otherwise normal parents who are illiterate, or too poor to purchase enriching toys or who are too undereducated, or the prevocally deaf because they do not speak? Obviously not.

Those elevated standards are not found in any statute or case law. Few Illinois citizens would be found fit to be parents. Such standards are not applied to normal parents and to appy them in this case to mentally retarded parents raises serious questions of equal protection under the law, pursuant to *Helvey* (supra) and *Meyers* (supra).

IV. SUMMARY

The findings of neglect and abuse by the trial court are clearly against the manifest weight of the evidence, lacking in support as to weight and sufficiency, which constitute an abuse of judicial discretion.

In addition, the application of Ill. Rev. Stat. 1985, ch. 40, par. 1501 D (p), placed Appellants in a constitutionally impermissible classification, which resulted in the application of a standard that is not applied to "normal" parents.

If allowed to stand, mentally retarded parents will be subjected to a standard as to their future ability to parent, absent any past or present evidence of pattern of abuse of neglect, which is not applied to other parents.

The effect or result from the application of this standard, results in an abrogation of Appellantts' (sic) fundamental constitutional right to establish a family and raise children, violating their right to equal protection under the law.

The state cannot demonstrate a compelling state interest in determining parental rights, when subjected to the strict scrutiny required of subsection (p), since the interest lies in speculation as to future capabilities, which is fraught with ambiguity and uncertainty.

Despite the explicit state policy of strengthening the minor's family ties, (Ill. Rev. Stat. ch. 37 section 701-2 (1-2), the trial court exercised the most restrictive means to further the perceived future best interest of the child.

If allowed to stand, the effect will result in a chilling effect upon mentally retarded persons to seek out services provided to them and to their children. Such services, it being the policy and law of the state to provide, which, through use, would stigmatize and punish as evidence of their future ability and right to raise their children.

CERTIFICATE OF SERVICE

I, Carol J. Bell, an attorney, hereby certify that on the twentieth day of November, 1986, I served one copy of the foregoing Respondent-Appellant's Brief in Support of Petition for Rehearing, upon Dan Flannel, Attorney at Law, by mailing the same First Class Postage Prepaid to 200 West Harrison Street, P.O. Box 195, Sullivan, Illinois 61951.

/s/ CAROL J. BELL ESQ.

Carol J. Bell, Esq.
Attorney for Respondent-Appellant

Carol J. Bell, Esq.
Protection and Advocacy, Inc.
175 West Jackson Blvd.
Suite A-2103
Chicago, Illinois 60604
(312) 341-0022

CERTIFICATE OF SERVICE

I, Carol J. Bell, an attorney, hereby certify that on the twentieth day of November, 1986, I served one copy of the foregoing Respondent-Appellant Brief's in Support of Petition for Rehearing, upon Paul Lee Stone, State's Attorney, by mailing the same First Class Prepaid Postage to the State's Attorney, Moultrie County Courthouse, Sullivan, Illinois, 61951.

/s/ CAROL J. BELL ESQ.

Carol J. Bell, Esq.
Attorney for Respondent-Appellant

Carol J. Bell, Esq.
Protection and Advocacy, Inc.
175 West Jackson Blvd.
Suite A-2103
Chicago, Illinois 60604
(312) 341-0022

CERTIFICATE OF SERVICE

I, Carol J. Bell, an attorney, hereby certify that on the twentieth day of November, 1986, I served three copies of the foregoing Respondent-Appellant's Brief in Support of Petition for Rehearing, upon Robert J. Biderman, Deputy Director, by mailing the same by First Class Postage Prepaid to the State's Attorney Appellate Service Commission, 151 Bruns Lane, Suite 103, Springfield, Illinois 62704.

/s/ CAROL J. BELL ESQ.

Carol J. Bell, Esq.
Attorney for Respondent-Appellant

Carol J. Bell, Esq.
Protection and Advocacy, Inc.
175 West Jackson Blvd.
Suite A-2103
Chicago, Illinois 60604
(312) 341-0022

Appendix C

No.

In The
Supreme Court of Illinois

IN THE INTEREST OF:
PAUL ENSIGN, JR.

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Respondant,

vs.

PAUL ENSIGN, SR. AND PATTI ENSIGN,
Defendant-Petitioner.

Petition for Leave to Appeal as a Matter of Right from the Appellate Court of Illinois, Fourth District,

No. 4-86-0265

There Heard on Appeal from the Circuit Court of the Sixth Judicial Circuit, Moultrie Co., Illinois
Honorable
W.B. Kranz
Judge Presiding

NOTICE OF FILING

To: Mr. Robert J. Biderman
Deputy Director
State's Attorney's Appellate
Service Commission
151 Bruns Lane, Suite 103
Springfield, Illinois 62706

PLEASE TAKE NOTICE that I have, this the 6th day of January, 1987, caused to be filed in the Office of the Clerk of the Supreme Court of Illinois, fifteen (15) copies of the Defendant-Petitioner's Petition for Leave to Appeal As a Matter of Right /Petition for Leave to Appeal in the above-captioned and hereby serve you with three copies of the same.

Carol J. Bell, Esq.
Attorney for Defendant-Petitioner

No.

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IN THE INTEREST OF:
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PETITION FOR LEAVE TO APPEAL AS A MATTER OF RIGHT
PETITION FOR LEAVE TO APPEAL

CAROL J. BELL, ESQ.
Protection and Advocacy, Inc.
175 West Jackson Blvd., Ste. A-2103
Chicago, Illinois 60604
(312) 341-0022

Attorney for Defendent-Petitioner
PAUL ENSIGN, SR. AND PATTI ENSIGN

In The
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Honorable
W.B. Kranz
Judge Presiding

PETITION FOR LEAVE TO APPEAL AS A MATTER OF RIGHT PETITION FOR LEAVE TO APPEAL

The defendant-petitioner, Paul Ensign, Sr. and Patti Ensign, respectfully petitions this Court for leave to appeal as a matter of right or alternatively, for leave to appeal from the judgement of the Appellate Court of Illinois, Fourth District.

PETITION FOR APPEAL AS A MATTER OF RIGHT/PETITION FOR LEAVE TO APPEAL

I

Petitioners, Respondent-Appellants, Paul Ensign Sr. and Pattie Ensign, appeal the decision of the Appellate Court as a matter of right, pursuant to S. Ct. Rule 317, raising a question under the Constitution of the United States and of this State, which has arisen in and as a result of the action of the Appellate Court.

In the alternative, Petitioners herein pray that leave to appeal be granted as a matter of sound judicial discretion.

II

The order of the Appellate Court was entered on October 30, 1986; Appellants filed a petition for rehearing on November 20, 1986, which was denied on December 3, 1986. Affidavit of Intent to Seek Review in the Illinois Supreme Court was filed by Appellants on December 8, 1986. A Petition for Certificate of Importance was filed on December 9, 1986 by Appellants, and was denied by the Appellate Court on December 17, 1986.

III

POINTS RELIED UPON FOR REVERSAL

1. There is need for this Court to exercise its supervisory authority and reverse the decision of the Appellate Court because of the effect the Court's decision on the generally important question presented, to wit: the constitutional rights of mentally retarded persons to marry and raise a family.

2. The order of the Appellate Court should be reversed because each and every one of the Appellate Court's findings that the evidence on the record supported the trial court's finding of neglect, abuse, dependency and the unfitness of these Appellants to be parents is against

the manifest weight of the evidence for the following reasons:

a. There is no evidence in the record of failure to thrive.

b. There is no evidence in the record of improper nutrition or clothing.

c. There is no evidence in the record of any lack of necessary medical attention.

d. There is no evidence in the record of any injury.

e. There is no evidence in the record of abandonment.

f. There is no evidence in the record of any lassitude.

g. There is no evidence in the record of any delayed development, either emotional or physical.

h. There is no evidence in the record that the child was dirty.

i. There is no evidence in the record of undernourishment..

j. There is no evidence in the record that the home was improperly heated.

k. There is no evidence in the record that the child ever consumed a dangerous substance.

l. There is no evidence in the record that this child ever experienced a medical emergency either through illness or physical trauma.

m. There is no evidence in the record of any past or present abuse or neglect.

3. This Court should reverse the decision of the Court of Appeals because the Fourth District in the instant case based its decision ultimately on the speculative future ability of Petitioners to be fit parents absent any acts or patterns of acts of abuse or neglect, whereas, in *In Re Interest of Brooks*, the same Fourth District decided that a finding

of unfitness requires actual acts or patterns of abuse or neglect to be firmly in evidence and barred speculation as to the future probability. Such a conflict should be considered and resolved by this Court.

4. This Court should reverse the decision of the Appellate Court because that court's decision is in conflict with *Helvey v. Rednour*, 86 Ill. App. 3d 154, 408 N. E. 2d 17 (1980), wherein the Fifth District decided that a finding of unfitness based solely on the classification of a parent as mentally retarded was unconstitutional under the federal constitution, and barred such finding absent actual evidence of abuse or neglect.

5. This Court should reverse the decision of the Appellate Court because that court made a decision pursuant to *Ill. Rev. Stat.* ch. 40. par. 1501D (p) regarding the Petitioners' future ability to discharge parental responsibilities that supported the trial court's error of failing to meet the clear and convincing evidentiary standard, since each and every finding of the trial court on this issue was against the manifest weight and sufficiency of the evidence.

6. This Court should reverse the decision of the Appellate Court because a serious public question arises when obedience to one law results in punishment by another law. That is, compliance with *Ill. Rev. Stat.* ch. 37, par. 701-2 (3) (b), in obtaining needed services for their child ultimately led to Petitioners being adjudicated unfit parents, in part because of their need for the services.

7. This Court should reverse the sustained dispositional order in this case because both the trial court and the Appellate Court could have exercised a less restrictive and severe alternative to adoption in the disposition of this case; the mere fact that these Petitioners are mentally retarded resulted in the most severe sanction possible under Illinois law.

8. This Court should reverse the decision of the Appellate Court because of the public policy consideration

of the chilling effect on mentally retarded persons who will hesitate to avail themselves of necessary services through fear of being identified as mentally retarded, thereby placing themselves in jeopardy of losing their children because they need services.

9. The Court should reverse the Appellate Court's decision because it violates the policy of the State of Illinois that implicitly recognizes the ability of mentally retarded persons to learn in its laws. *Ill. Rev. Stat.*, ch. 91 1/1, par. 1-111.

STATEMENT OF FACTS

The minor, Paul Ensign, Jr. was born on November 28, 1984 to Patti and Paul Ensign, Sr., a mentally retarded couple. (R. 14, 52)*

On or about December 12, 1984, the minor, Paul Ensign, Jr., accidentally slipped from an infant seat that his father was carrying him in. (R. 9) An individual who witnessed the incident as well as another townsperson became concerned that the baby might have been injured and went to locate the Petitioners. (R. 14) The individuals thereupon contacted the county health nurse who went to the Petitioner's home to examine the baby. (R. 14, 30) The nurse did examine the baby and found no injuries, bruises or contusions. (R. 30) She recommended, however, that the Petitioners have the baby examined by a physician, which they did. (R. 30) The child was found to be uninjured.

On December 18, 1984, the department of Children and Family Services (hereinafter referred to as "DCFS") became involved with the Petitioners, and began providing homemaker services. (R. 196, 210) Initially, a homemaker visited the Petitioners' home five (5) times a week

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* "R" refers to the transcript of the hearings on December 17, 1985 and January 7, 1986. "C" refers to all of the record except the transcript.

for two (2) hours a day. (R. 218) After several months, the homemaker visited the Petitioners' home three (3) times a week for two (2) hours a day. Throughout the period of time in which the Petitioners received homemaker services, the Petitioners cooperated fully with anyone who came into their home to assist with their baby, including concern townspeople, social workers, and the DCFS homemaker. (R. 20, 41, 201, 216) The services continued until December 15, 1985, whereupon the homemaker became ill. Thereafter, the homemaker visited the Petitioner's home twice between December 15, 1985 and January 7, 1986, at which time Paul, Jr. was removed from the home and custody of his parents. (C. 87, R. 218)

The Petitioner, Paul Ensign, Sr., works as a farm laborer, and has worked for the same farmer for fifteen (15) years. (R. 162) He works during the spring, summer and fall, as the weather dictates. (R. 170) The Petitioner, Patti Ensign, is a housewife and remains at home while her husband is working. (R. 213) The minor, Paul Ensign, Jr., is characterized by two physicians as a healthy, normal baby, who despite having microcephalia, is developing normally the first year of his life. (R. 155, 157, 158, 179, 189) The minor's microcephalia was viewed as being genetic as both parents also have abnormally small heads. (R. 177) There is no evidence in the record that the child was ill-cared for, that he exhibited a failure to thrive, was ill-fed or did not receive necessary medical care. The child was not abandoned or left unsupervised by his parents.

A Petition for Neglect, Dependency and For Termination of Parental Rights was filed against Petitioners on July 8, 1985. (C. 1) Shortly after the Petition was filed, the Petitioners were examined by two psychologists to test their mental abilities and presumably their suitability to be parents, (R. 82, 122) Neither psychologist examined the child, nor did either observe the Petitioners with their child. (R. 81, 124)

A hearing was held on the Petition For Neglect and Dependency and For Termination of Parental Rights on December 17, 1985. and continued and completed on January 7, 1986. Upon completion of the January 7, 1986 hearing, the trial court entered an order which was filed on January 14, 1986, adjudicating the minor to be neglected, abused and dependent, and finding the Petitioners unfit parents and terminating their parental rights. (R. 302, 303) (C. 90, 91, 94) The minor was thereupon removed from the custody of Petitioners, and placed in the custody of DCFS' guardianship administrator who was given the power to consent to the minor's adoption. (C. 94) Visitation rights have been consistently denied through the pendency of this appeal and Petitioners have not been allowed to see their child since that date. On March 26, 1986, a hearing was held on several motions for a new hearing and a final dispositional order was entered finding the Petitioners unfit parents, and terminating their parental rights. (C. 151, 152) Shortly thereafter, the Petitioners filed a notice of appeal on April 15, 1986. (C. 164)

V.

The Appellate Court order should be reviewed reversed by this Court for the following reasons:

A. *The Appellate Court's findng that the evidence supports the trial court's finding of neglect or dependency of this minor child was against the manifest weight of the evidence.*

A careful reading of the record reveals that there is no evidence of abuse or neglect of this minor child by the Petitioners. However, the Appellate Court found that these Petitioners failed to provide proper care for the minor, and cited four particular areas:

1. That Petitioners were unable to properly feed the child. Again, examination of the record reveals that, in fact, four of the state's witnesses and one of Petitioner's testified that Petitioners could, and did, feed their child.

The state's witnesses testified that Petitioners picked up the WIC vouchers every month, which entitled them to obtain food for their child; (R. 35) that the baby was gaining weight and growing; (R. 40) that just by looking at the child it was observable that he was gaining weight; (R. 112) that Petitioners were capable of feeding their child; (R. 131) that the child was eating solid foods. (R. 105)

Petitioners' witness, pediatrician Virginia Dauz, M.D., testified that the child was gaining weight within the normal range. (R. 159)

In light of the above testimony, the finding that Petitioners were unable to properly feed their child is against the manifest weight of the evidence.

2. That Petitioners were unable to properly regulate the temperature in their home. Several witnesses had testified that the apartment was kept too hot. The inference was that Petitioners were unable to properly regulate the temperature. An equally valid inference is that the Petitioners preferred a warm apartment. No one testified that any harm resulted to the child from the temperature in the apartment.

The lack of evidence of any harm resulting to the child, and as to Petitioner's preference is heating makes this finding against the manifest weight of the evidence.

3. That Petitioners were unable to recognize and appropriately respond to medical emergencies. The only testimony that specifically addressed a situation remotely resembling a "medical emergency" was the incident where the baby accidently fell out of the carrier seat. On that occasion, the child sustained no injury, as testified to by the county nurse, Joanna Cole, who examined him. Thus, there was no emergency on that occasion, and no other referred to in the record. Indeed, the other evidence in the record indicates that the child is very healthy and has rarely been sick. (R. 213)

We submit that the finding that Petitioners were unable to recognize and appropriately respond to a medical emergency was speculative and against the manifest weight of the evidence.

4. That Petitioners were unable to provide adequate emotional and physical stimulation. The only testimony directly on point in the record is from the neuropediatrician, Dr. Daniel Pochetti, who stated that, to his surprise, despite the fact that this child suffers from microcephalia, the child is not developmentally delayed or retarded at all, and that his development is within normal limits. (R. 189) Additionally, the record is filled with references to how much Petitioners love their child and care for him, (R. 159, 167, 184, 210), how they were always with him, (R. 217, 219), that they played with him and held him, (R. 201), and that when they were unsure, they asked for assistance or instruction. (R. 198-200)

All other references to Petitioner's abilities to adequately stimulate their child are future, or speculative, in nature, rather than based upon fact or factual evidence on the record. Thus, the finding that Petitioners were unable to provide adequate emotional and physical stimulation is against the manifest weight of the evidence.

B. *The Appellate Court's finding that the evidence supports the trial court's finding of abuse in this case, based on the conclusion that the minor's environment is injurious to his welfare is against the manifest weight of the evidence.*

The Appellate Court found that the evidence supported the trial court's finding of abuse to the minor child in this case based upon two particulars:

1. That the minor was dropped on a hard surface at a very young age. The incident relied upon for this finding was an accident that occurred when Petitioner was carrying his child in a carrier seat. While trying to arrange the child more comfortably, the child slipped out of the seat. The child suffered no injury, although he was examined by

both a nurse and a doctor. Surely one accidental incident does not constitute a child's "environment", or "abuse."

Any finding, based upon this isolated incident, that this child is abused or that this child's environment is injurious to his welfare is against the manifest weight of the evidence.

2. That Petitioners failed to comprehend potentially dangerous conditions is and around their home, and tend to leave dangerous items, such as medicine, within the minor's reach. This conclusion was apparently reached because of the evidence on the record that on one occasion, Petitioners unknowingly left a non-childproof medicine container on the floor, which they removed as soon as it came to their attention. Additionally, Petitioners relied on their home interventionist to learn about potentially hazardous situations and complied with her suggestions promptly when made. (R. 220, 223-224, 227, 246)

In light of all of the evidence this conclusion is against the manifest weight of the evidence.

C. *The Appellate Court's finding that the trial court had sufficient evidence to terminate parental rights not only did not meet the clear and convincing evidence standard but is also against the manifest weight of the evidence.*

The Appellate Court outlined sections b, d, g, 1, o, and p of the Illinois Adoption Act, (Ill. Rev. Stat. 1985, ch. 40, par. 1501D), in its discussion of what constitutes an unfit parent. It determined that sufficient evidence existed to support a finding of unfitness on any one of the sections indicated. However, that determination was based upon the sufficiency of evidence of abuse or neglect, which we have already demonstrated is against the manifest weight of the evidence.

The Court then indicated that the finding of unfitness pursuant to subsection (p) of the Act is the most conclusive and indisputable. That section defines unfitness as "inabil-

ity to discharge parental responsibilities supported by competent evidence from a psychiatrist or clinical psychologist of mental impairment, mental illness, or mental retardation as defined in Section 1-116 of the Mental Health and Developmental Disabilities Code, or developmental disability as defined in Section 1-106 of that Code, and there is sufficient justification to believe that such inability to discharge parental responsibilities shall extend beyond a reasonable time period."

The Appellate Court agrees that such a finding shall be by clear and convincing evidence. The evidence that it believes to be clear and convincing includes the testimony of two psychologists that Petitioner's (sic) both suffer from severe mental impairment. Additionally, the court stated that the evidence in the case conclusively demonstrated that due to their mental impairment, Petitioners are unable to discharge their parental responsibilities. It stated again that Petitioners are unable to provide proper nutrition, despite the evidence on the record to the contrary. (R. 35, 40, 112, 131, 105, 159) Additionally, it stated again that Petitioners are unable to provide appropriate medical care despite an on-going relationship with a pediatrician, and other evidence to the contrary. (R. 159, 213)

Finally, the court pointed to the Petitioner's inability to provide "emotional and physical stimulation for the minor", as evidence of unfitness. The great weight of the evidence is to the contrary. (R. 189, 159, 167, 184, 201, 217, 219, 201, 198-200)

Since the great weight of the evidence supports the contention that Petitioners are currently able to discharge their parental responsibilities, then the Court's conclusions are only supported by the psychologists' speculative testimony as to Petitioner's (sic) future abilities to discharge their parental responsibilities. That is not sufficient under the statute.

D. *The Appellate Court's decision is based upon future speculation as to Petitioners' abilities to discharge parental responsibilities thereby conflicting with another Appellate Court decision; the application of the instant statute, a case of first impression, creates a constitutionally impermissible classification. Helvey v. Rednour, 4, Ill. Dec. 671, 408 N.E. 2d 17 (1980).*

Since the manifest weight of the evidence is against any conclusion of neglect, abuse, dependency or present inability to discharge parental responsibilities, the decision of parental unfitness rests upon future speculation and the fact that Petitioner's (sic) are developmentally disabled. *In The Interest of Brooks*, 63 Ill. App. 3rd 328, 379 N. E. 2d 872 (1978), stands for the proposition that a finding of unfitness requires a finding of an actual past act of abuse, and bars speculation about the future care of the child, unless such act or pattern of acts are firmly in evidence. *See, also, In Re Stilley*, 66 Ill. 2d, 515, 363, N.E. 2d 820 (1977). Examples of past acts or patterns of abuse or neglect include the following clear findings as to some parents' inability to discharge parental responsibilities:

a. Feeding the child soda pop and chocolate milk, and failure to dispose of dirty diapers and sanitary napkins, *In Re Devine*, 81 Ill. App. 3d 314, 401 N.E. 2d 616 (fifth dist. 1981), and the parents failed to learn to prepare the infant's formula, the baby was dirty and roaches were found in the food.

b. *In Re Edmonds*, 85 Ill. App. 3d 228, 406 N.E. 2d 231 (third dist., 1980) involved a mentally retarded mother whose failure to remove the child from the crib resulted in an infant with poor motor abilities and at 32 months was unable to walk.

c. In, *In Re Hill*, 102 Ill. App. 3d 387, 430 N.E. 2d 75 (First Dist., 1981), the apartment had no gas or hot water, no refrigerator, food or stove. The home had no beds and the condition of the child was described as weak and dull-

eyed.

d. In *Devine* and *Edmonds* the parents rejected any efforts to teach home making or child rearing skills.

e. Mental retardation alone is not in and of itself sufficient for a finding of unfitness. *Helvey* (supra).

f. Abandonment of the child *In the Interest of Gates*, 57 Ill. App. 3d 844, 373 N.E. 2d 568 (Fifth Dist. 1978).

g. Failure to provide specific care to a handicapped child, together with abandonment, *In Re Grant*, 29 Ill. App. 3d 731, (First Dist., 1978).

h. Failure to protect a child from physical abuse, *In Re Brown*, 86 Ill. 2d 147, 427 N.E. 2d 84 (1981), *Dalton*, (supra).

These have provided a basis in fact for termination of parental rights, when proven by clear and convincing evidence i.e., proof that leaves no reasonable doubt concerning the truth of the matter at issue, a standard of evidence more conclusive than a mere preponderance of evidence. *In Re Drescher*, 47, Ill. Dec. at 636, *In Re Stephenson*, 68 Ill.2d 544 (1977). *In Re Hobeck*, 95 Ill. App. 3d 169, 419 N.E. 2d 713, (Fourth Dist. 1981), required the State to prove by clear and convincing evidence of one or more statutory grounds, the unfitness of the parents.

In determining fitness the court must look to the conduct of the parents during the entire period of time in question and not simply scrutinize any single isolated period, *Adams v. Adams*, 58 Ill. Dec. at 716. In *Paul v. Steele*, 101 Ill. 2d. 345, this Court stated,

> "A judgment that a person is unfit to rear his or (sic) own child is one of the most devastating of judicial decisions. A fundamental right is involved; parents have rights superior to others, including the State, in the rearing of their child unless it is shown by clear and convincing evidence they have forfeited one of mankind's most important rights."

In the absence of any clear and convincing evidence of past acts or patterns of abuse or neglect, and in the absence of any evidence that these Petitioners are currently unable to discharge parental responsibilities, the speculative testimony of the psychologists' about Petitioners' future ability to discharge parental responsibilities barred by *Brooks*, (supra), and *Stilley*, (supra), the Court's decision rests solely on the fact that these Petitioner's are mentally retarded.

A decision based upon such a classification requires strict scrutiny by this Court. *Meyer* v. *Nebraska*, 262 US 390, 43 S. Ct. 625, 67 Led 1042 (1923). Such a scrutiny reveals the same problems discussed in *Helvey*, (supra) where this Court decided that the right of a retarded couple to raise a family was constitutionally protected, and that a finding of continued mental retardation in the future was insufficient to prove the unfitness of the parent in the present. In the absence of past or present patterns or acts of abuse or neglect, the speculation as to future abilities under subsection (p) of the act does not pass constitutional muster. Such a strict scrutiny would reveal no compelling state interest for the classification in the absence of any neglect, abuse or injury to this child.

This Court must exercise its supervisory authority and require the Appellate Court to comply with *Meyer* v. *Nebraska* and with its decision in *Helvey*. Failure to comply with these cases violates the constitutional rights of these Petitioners. The Appellate Court must be required to find, by clear and convincing evidence, either past acts or patterns of abuse or neglect or present inability to discharge parental responsibilities prior to taking children away from their parents. As a result of the action of the Appellate Court, a constitutionally impermissible classification was established which raises a question of equal protection under the Constitution of the United States and of this state for the first time.

E. *The Appellate Court's finding that there is sufficient justification to believe that Petitioner's (sic) "inability to discharge parental responsibilities will extend beyond a reasonable time," is not supported by clear and convincing evidence and is against the manifest weight of the evidence.*

The Appellate Court's first reason for the above finding is that it is undisputed that the Petitioner's mental retardation will not be alleviated in the foreseeable future. This Court already stated in *Helvey*, (supra), that mental retardation alone is insufficient for a finding of unfitness, thus, it is axiomatic that future unfitness cannot be based on the fact of mental retardation alone. Such a finding also violates the *Helvey* decision.

The next reason the Appellate Court cites for its finding that Petitioner's inability to discharge parental responsibilities will exend beyond a reasonable time is the fact that the child is at high risk for developmental delay and retardation, and these conditions are likely to manifest themselves in the future, thereby increasing the amount of care the minor will need. It reached this conclusion despite direct testimony by neuropediatrician Dr. Daniel Pochetti's testimony that despite the fact that this child suffers from microcephalia, the child is not currently developmentally delayed or retarded at all. His development is within normal limits. (R.189) Any speculation as to the future needs of this child is just that, speculation. Such speculation is insufficient for either statutory or constitutional reasons, *see Helvey* and Ill. Rev. Stat. 1985, ch. 40, par. 1501D (p).

The Appellate Court then concludes that the Petitioner's parenting skills will remain static, despite overwhelming evidence to the contrary. (R. 220, 223-224, 227, 246, 198-200, 106-107, 114, 127-134, 35) Indeed, there is testimony by both the court's psychologists, Drs. Matthews and Gillespie and the county nurse, Joanna Cole, that there are head start programs available for early intervention in the area (R. 84, 127-134, 198-200), which Petitio-

ners already use and cooperate with.

Based upon the speculative nature of the Appellate Court's decision on this point as well as the above-described testimony, we believe that this part of the Appellate Court's decision was against the great weight of the evidence.

F. *There is a need for the Supreme Court to exercise its supervisory authority because of the general importance of the question presented. There is a serious public policy issue when obedience to one law results in punishment by another law.*

These Petitioners, as guardians of their child, have a responsibility to obtain services necessary to their child's development, Ill. Rev. Stat. ch. 37, par. 701-2 (3) (b), wherein it states "every child has a right to services necessary to his proper development, including health, education and social services." These Petitioners insured that their child received necessary services, thereby demonstrating their ability to exercise their parental responsibilities. In part, it is the very need for these services that led to the termination of their parental rights. When they opened their home to the State, they availed themselves of services, which ultimately led to the determination by the legal system that they are unfit parents and incapable of discharging their parental responsibilities. Ironically, it is the same legal system that requires them to seek out these services for their child. This results in a chilling effect on parents seeking necessary services for their children or themselves. This Court has a compelling interest in avoiding such punitive results.

G. There is a need for the exercise of the Supreme Court's authority because the dispositional order for adoption of the child was against the manifest weight of the testimony of the state's witnesses who recommended foster placement, and admitted that parenting classes for the Petitioners would be beneficial; thereby recognizing the

potential for these Petitioners to learn the necessary skills to raise their child. (R. 127-134)

H. The lower court's opinion should be reversed because the denial by the trial court of the Petitioner's motion for the appointment of an expert at the dispositional hearing deprived Petitioners of the right to present evidence that would show that the disability of being mentally retarded is not static or unchanging. The psychologists upon whose testimony the court relied claimed no expertise in working with or knowledge of the actual adaptive skills of the mentally retarded, yet the court disallowed the Petitioners the opportunity to show, through expert testimony, that mentally retarded persons are capable of learning. Indeed, the record is replete with evidence that these Petitioners did learn to better care for their child.

This presumption by the lower court that mentally retarded persons are per se unable to learn, violates the policy of this state which requires its Department of Mental Health and Developmental Disabilities to provide for the habilitation of mentally retarded persons; that is, an effort toward the alleviation of the effects of the condition, or toward increasing the level of physical, mental, social or economic functioning, (*Ill. Rev. Stat.* ch. 91½ par. 1-111), a requirement that implicitly recognizes the ability of mentally retarded persons to learn in the future and to have learned in the past.

Respectfully submitted: Dated: January 6, 1987

/s/ CAROL J. BELL ESQ.

Carol J. Bell, Esq.
Protection and Advocacy, Inc.

CERTIFICATE OF MAILING

I, Carol J. Bell, an attorney, hereby certify that on the sixth day of January, 1987, I mailed three copies each to the following persons at the addresses noted of the Petition for Leave to Appeal As a Matter of Right / Petition for Leave to Appeal to the Illinois Supreme Court filed this date with the Illinois Supreme Court, by First Class Postage Prepaid:

Robert J. Biderman, Deputy Director
State's Attorney's Appellate
Service Commission
151 Bruns Lane
Suite 103
Springfield, Illinois 62706

Paul Lee Stone, Esq.
State's Attorney
Moultrie County Courthouse
Sullivan, Illinois 61951

Dan Flannel, Esq.
Attorney at Law
200 West Harrison, P.O. Box 195
Sullivan, Illinois 61957

/s/ CAROL J. BELL ESQ.
Carol J. Bell, Esq.
Attorney for Defendant-Petitioner

Carol J. Bell, Esq.
Protection and Advocacy, Inc.
175 West Jackson Blvd.,
Suite. A-2103
Chicago, Illinois 60604
(312) 341-0022